FILED
98 367 AUG 31 1998
OFFICE OF THE CLERK

Nos. 98-___, 98-___

In The

Supreme Court of the United States

October Term, 1997

ROBERT D. HANNIGAN, WARDEN, *et al.*,

Petitioners,

v.

RAYMOND F. STANSBURY,

Respondent.

CHARLES SIMMONS, SECRETARY OF CORRECTIONS, *et al.*,

Petitioners,

v.

MICHAEL A. BANKES,

Respondent.

On Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRITS OF CERTIORARI

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson St., Suite 400
Topeka, Kansas 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General

STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)

301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(785) 296-2215

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

87 pp

QUESTIONS PRESENTED

1. Is a state department of corrections regulation that implements a statutory directive that all good time credits "shall be awarded on an earned basis", or that defines what constitutes "good behavior" and the consequences of misbehavior, a "law" for *ex post facto* purposes?

2. Does a state department of corrections regulation that changes the awarding of good time credits from "a projected basis" to "an earned basis", as required by the controlling statute, and solely for purposes of determining an inmate's conditional release date, without any negative impact on credits accumulated prior to the regulation's effective date or the total amount of credits available, violate constitutional *ex post facto* principles?

3. Does a state department of corrections regulation that changes prospectively the good time credit losses for inmate misconduct, but which does not alter the credits already accumulated nor the total amount of credits available, violate constitutional *ex post facto* principles?

4. Does a state department of corrections regulation that changes prospectively the definition of good behavior for purposes of awarding earned good time credits by, for example, requiring convicted sex offenders to participate in mental health treatment programs as an aspect of good behavior, but which does not alter the credits already accumulated nor the total amount of credits available for good conduct, violate constitutional *ex post facto* principles?

LIST OF PARTIES

Hannigan v. Stansbury:

Robert D. Hannigan, Warden; David R. McKune; William Cummings; Anthony McElroy; Jamie Lanza; and J. Wark

Simmons v. Bankes:

Charles Simmons, Secretary, Kansas Department of Corrections; Robert D. Hannigan; Mr. Wilson, Mr. Taylor, Mr. Robinson, Mr. Stokes, Mr. Ron Hicks, and Kansas Department of Corrections

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE WRIT 13

I. The Kansas Supreme Court's Decisions Are Contrary To Decisions Of Federal Courts Of Appeal And Other State Courts Of Last Resort 13

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles 13

B. The Kansas Supreme Court's Decisions Address Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance 21

II. The Kansas Supreme Court's Decisions Are Contrary To This Court's *Ex Post Facto* Decisions 22

CONCLUSION 29

APPENDICES 1a

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Cody, 951 F.2d 280 (10th Cir. 1991) 14

Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991) 15

Bailey v. Noot, 503 U.S. 952 (1992)..... 10, 15, 21, 23

Beck v. Kansas Adult Authority, 241 Kan. 13, 735 P.2d 222 (1987) 5

Beebe v. Phelps, 650 F.2d 774 (5th Cir. 1981)..... 14

California Dept. of Corrections v. Morales, 514 U.S. 499 (1995) ..... *passim*

Chauvin v. Erickson, 998 F.2d 617 (8th Cir. 1993) ..14, 18

Collins v. Youngblood, 497 U.S. 37 (1990) ..... *passim*

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1995) 28

Dobbert v. Florida, 432 U.S. 282 (1977) 23, 25

Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996) 10, 14, 15, 19, 23

Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993) 14, 15, 18, 19, 23

Francis v. Fox, 838 F.2d 1147 (11th Cir. 1988) 15

Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995)..... 18

Hudson v. United States, 522 U.S. ___, 118 S. Ct. 488 (1997) 28

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992)..... 18

Kansas v. Hendricks, 521 U.S. ___, 117 S. Ct. 2072 (1997) 15, 24, 28

TABLE OF AUTHORITIES – Continued

Page

Knox v. Lanham, 895 F. Supp. 750 (D. Md. 1995). 14

Knuck v. Wainwright, 759 F.2d 856 (11th Cir. 1985) 14

Lindsey v. Washington, 301 U.S. 397 (1937) 23, 26

Lynce v. Mathis, 519 U.S. ___, 117 S. Ct. 891 (1997) 14, 20, 23, 27, 28

Miller v. Florida, 482 U.S. 423 (1987).. 10, 14, 15, 23, 24, 26

Piper v. Perrin, 560 F. Supp. 253 (D.N.H. 1983) 14

In re Ramirez, 39 Cal. 3d 931, 218 Cal. Rptr. 324, 705 P.2d 897 (1985).....14, 17

Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995)..... 18

Spradling v. Maynard, 527 F. Supp. 398 (W.D. Okla. 1981).....11, 14

United States v. Byrd, 116 F.3d 770 (5th Cir. 1997) 14

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992) 15

Weaver v. Graham, 450 U.S. 24 (1981) ..... *passim*

United States v. Ursery, 518 U.S. 267 (1996) 28

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10 1

STATUTES

28 U.S.C. § 1257(a) 1

Sup. Ct. R. 12.4 1

Sup. Ct. R. 13.1 1

K.S.A. § 22-3717(a) 1, 5

TABLE OF AUTHORITIES – Continued

Page

K.S.A. § 22-3718 ..... 1, 5

K.S.A. § 22-3725 ..... 2, 5

K.A.R. 44-6-108 ..... 6, 7

K.A.R. 44-6-124 ..... *passim*

K.A.R. 44-6-142 ..... 2, 6

OTHER AUTHORITIES

16A C.J.S. *Constitutional Law* § 409 10

Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Georgetown L. J. 2143 (1996) 28

Thomas K. Landry, *"Punishment" And The Eighth Amendment*, 57 Ohio St. L. J. 1607 (1996) 15

Kan. City Star A3 (Aug. 3, 1998) 22

Kan. City Star A12 (Aug. 9, 1998) 22

OPINIONS BELOW

The June 5, 1998, decisions of the Kansas Supreme Court, holding that certain administrative regulations governing good time credits violate constitutional *ex post facto* principles are reported, 265 Kan. 404, ___ P.2d ___ (1998), and 265 Kan. 341, ___ P.2d ___ (1998), and are included as Appendix A. The unreported July 8, 1998 orders of the Kansas Supreme Court denying the petitioners' request for rehearing are included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decisions in these cases on June 5, 1998, and denied the State's timely petitions for rehearing on July 8, 1998. This petition has been filed within ninety days of the latter date as required by Supreme Court Rule 13.1. Because the judgments in these cases involve identical or closely related questions, this single petition for writs of *certiorari* addresses both cases. Sup. Ct. R. 12.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause applicable to the States provides that

> "No State shall . . . pass any . . . ex post facto Law. . . . U.S. Const. Art. I, § 10.

Kansas Statute Annotated (K.S.A.) § 22-3717(a) provides in part that an inmate

> shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.

K.S.A. § 22-3718 provides in part that an inmate's conditional release date is

> the inmate's maximum term or terms, less such work and good behavior credits as have been earned. . . .

K.S.A. § 22-3725(d) provides that

> Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.

One of the two Kansas Administrative Regulations ("K.A.R.") invalidated in these cases, K.A.R. 44-6-142, provides as follows:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

The prior version of the regulation, effective when the respondents were convicted and sentenced, provided that

> When computing the conditional release date, it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied *on a projected basis*. K.A.R. 44-6-142 (1989) (emphasis added).

The other regulation the Kansas Supreme Court invalidated, K.A.R. 44-6-124(g) (1993), provides in part as follows:

> (g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.
>
> (1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.
>
> (2) A guilty finding of a class II disciplinary offense shall result in the withholding of a

minimum of 25% but not more than 50% of the good time credits available for that program classification review period.

(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period.

* * *

(6) A refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail.

The version of K.A.R. 44-6-124 in effect when respondents were convicted and sentenced provided that

(a) For parole eligibility, award of good time credits shall be limited as follows:

(1) Inmates with no class I offenses during the review period shall receive at least 50% of the good time credits allocated for that period.

(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.

(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.

(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate.

STATEMENT

Procedural History

Respondent Michael A. Bankes has been incarcerated since 1990 under a 4- to 15-year sentence for indecent liberties with a child and additional consecutive sentences for drug offenses. Respondent Raymond F. Stansbury, has been incarcerated since 1991 under a 10- to 20-year sentence for rape. Respondents filed these state post-conviction actions in Kansas district courts, alleging that changes in the Kansas Department of Corrections regulations regarding the awarding of good time credits for purposes of determining an inmate's parole eligibility and conditional release dates violates the constitutional prohibition on *ex post facto* laws. One district court dismissed Bankes' suit while another district court ruled in Stansbury's favor.

On June 5, 1998, in two separate opinions that reference each other, the Kansas Supreme Court reversed the dismissal of Bankes' suit, and affirmed judgment in Stansbury's favor, holding that the regulations at issue are constitutionally prohibited *ex post facto* laws. Appendix A. On July 8, 1998, the Kansas Supreme Court denied the State's timely request for rehearing in both cases. Appendix B. On July 9, 1998, the Kansas Supreme Court denied the State's petition for review of a Kansas Court of Appeals decision raising substantially similar *ex post facto* issues. That case is the subject of a separate petition, *McKune, et al. v. Steltzlen*, No. 98-___, filed simultaneously with this petition.

The Kansas Supreme Court denied the State's request for a recall of the mandate in these cases pending proceedings in this Court. Appendix C. Petitioners are filing simultaneously with this petition an application for a stay of these decisions with Justice Breyer, Circuit Justice for the Tenth Circuit.

Statement of Facts

1. *The Kansas Statutes And Administrative Regulations Concerning Good Time Credits And Parole Eligibility Dates*

In Kansas, the awarding of good time credits is authorized by statute. *See* K.S.A. § 22-3725. Some details of how such credits are earned, awarded, forfeited, withheld and accumulated are included in the statute, but the statute also provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." *Id.* at § (d).

The earning, awarding, forfeiting, withholding and accumulation of good time credits affect two important dates for inmates: (1) an inmate's parole eligibility date; and (2) an inmate's conditional release date. The parole eligibility date is, as its name suggests, the date on which an inmate first becomes eligible to be considered for parole. In Kansas, that date is the "entire minimum sentence imposed by the court, less good time credits." K.S.A. § 22-3717(a). The conditional release date, on the other hand, is the date on which an inmate is entitled to be released from incarceration. Conditional release is "the inmate's maximum term or terms, less such work and good behavior credits as have been earned." K.S.A. § 22-3718; *see generally Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222, 234-35 (1987).

These important dates, when the inmate is serving an indeterminate sentence less than life imprisonment, are

calculated by deducting good time credits from the minimum and maximum terms of imprisonment respectively. Thus, the parole eligibility date for an inmate like Stansbury serving a 10- to 20-year sentence is calculated by deducting earned good time credits from 10 years, while the conditional release date is calculated by deducting good time credits from 20 years.

With respect to conditional release dates, the Department of Corrections regulation in effect at the time the respondents in these cases committed their crimes, were convicted and sentenced, provided that "it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied on a projected basis." K.A.R. 44-6-142 (1989); *see also* K.A.R. 44-6-108(c) (1989). This meant that, solely for purposes of calculating the conditional release date, the instant an inmate entered prison the inmate was presumed to have earned 100% of the available good time credits. So, in the preceding example, if the available good time credit on a 20-year sentence was 10 years, the inmate's conditional release date would be 10 years from the beginning date of the sentence, and that date would be established the day the inmate entered the prison. In 1995, however, the Department of Corrections amended the regulation to conform to the statutory directive that good time credits be "earned," providing that

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

With respect to parole eligibility dates, the department of corrections regulations never presumed that 100% of available good time credits would be earned.

Rather, good time credits counting toward parole eligibility had to be actually earned and were accumulated only as they were earned. *See* K.A.R. 44-6-108(b) (1989). Also, at the time these respondents committed their crimes, were convicted and sentenced, good time credits for parole eligibility were awarded on a minimum percentage basis for each category or categories of prison offenses that inmates avoided committing during the review period. *See* K.A.R. 44-6-124(a) (1989) (quoted in full above). In other words, the regulations were phrased in terms of minimum rewards for good behavior. That changed, however, in 1993, when the regulations were amended to require minimum withholding of good time credits for prison offenses (rather than minimum awards for good conduct), and to provide that refusal to participate in an assigned program, such as the Sexual Abuse Treatment Program, would result in the withholding of 100% of good time credits for the review period. *See* K.A.R. 44-6-124(g)(1)-(6) (1993) (quoted in full above).

Thus, the regulations at issue in these cases made three changes in the good time credit regulations (but not the statutes) in effect when the respondents committed their crimes, were convicted and sentenced: (1) good time credits toward conditional release are no longer presumed earned on a projected basis but, after March 1, 1995, must be actually earned; (2) for both parole eligibility and conditional release, good time credits are determined by minimum withholding for misconduct rather than by minimum rewards for good conduct; and (3) good conduct, for purposes of potentially withholding good time credits, has been further defined to include participation in assigned programs, such as the Sexual Abuse Treatment Program.

What is undisputed and unchanged about good time credits in Kansas is that the relevant statutes have not changed and the total amount of good time credits available to shorten parole eligibility and conditional release

dates is unchanged. Only if the respondents engage in misconduct after the effective dates of the regulatory changes discussed above will their parole eligibility and conditional release dates be any different than they would have been under the regulatory scheme in effect when respondents committed their crimes, were convicted and sentenced.

2. *Raymond F. Stansbury*

Raymond Stansbury was convicted of rape and sentenced to a term of 10 to 20 years in 1991. App. 3a. As noted previously, administrative regulations in place in the Kansas prisons in 1991 did not authorize the withholding of good time credits for refusal to participate in formal programs, such as a treatment program. *Id.* at 3a-4a. Stansbury's unit team in the prison recommended that he participate in the Sexual Abuse Treatment Program (SATP). *Id.* at 4a.

A condition of participation in the SATP is an admission of guilt by the inmate. Stansbury has refused to participate in the SATP because of this requirement. As a result, the prison has withheld 100% of Stansbury's good time credits applicable to his parole eligibility date since April, 1994, following the 1993 amendment to the regulations to provide that a refusal to participate in an assigned program shall result in a 100% withholding of good time credits for that review period. *Id.* The prison also has withheld credit toward Stansbury's conditional release date since the 1995 amendment requiring that such credits be actually earned. *Id.* at 7a-14a.

3. *Michael A. Bankes*

In 1990, Michael Bankes was convicted of indecent liberties with a child and sentenced to 4 to 15 years in prison. App. 28a. Bankes also received consecutive 1- to 5-year and 4- to 15-year sentences for drug offenses. As

discussed above, the administrative regulations in place in the Kansas prisons in 1990 did not authorize the withholding of good time credits for refusal to participate in formal programs, such as a treatment program. *Id.* at 29a. Bankes' sentence did not include any order for him to participate in any kind of sexual offender treatment program, *id.*, but his unit team in the prison recommended that he participate in the Sexual Abuse Treatment Program (SATP). *Id.*

A condition of participation in the SATP is an admission of guilt by the inmate. *Id.* at 28a. Like Stansbury, Bankes has refused to participate in the SATP because of this requirement. *Id.* As a result, the prison has withheld 100% of Bankes' good time credits applicable to his conditional release date since 1995, *id.* at 29a, following the 1993 amendment of K.A.R. 44-6-124 to provide that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period," unless the inmate is determined to be physically or mentally unable to participate.

4. *The Kansas Supreme Court's Decisions*

A majority of the Kansas Supreme Court concluded that the amended regulations amounted to *ex post facto* violations when applied to Bankes and Stansbury. The Chief Justice dissented, but without a written opinion.

a. *Stansbury v. Hannigan, et al.*

The Kansas Supreme Court began its *ex post facto* analysis by citing and quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that, in order for a law to be *ex post facto*, two critical

elements must be present. "The law must be retrospective, applying to events occurring before its enactment, and it must disadvantage the offender affected by it." App. 14a (paraphrasing *Weaver*, 450 U.S. at 29). The court first considered whether the constitutional *ex post facto* prohibition applies to prison regulations, as opposed to legislative enactments, but concluded that, at least in Kansas, it must. The court relied upon the proposition that "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the Ex Post Facto Clause." App. 14a (citing 16A C.J.S., *Constitutional Law* § 409, p. 355). The court observed that regulations adopted in accordance with the procedures set forth by the Kansas Legislature have the force and effect of law in Kansas. App. 15a. The court pointed out that the Kansas Department of Corrections is a state agency, and opined that the agency, when adopting good time credits regulations, "acts as a political subdivision exercising delegated legislative power." *Id.* For that reason, the court concluded that the prison regulations at issue in these cases "are within the ambit of the Ex Post Facto Clause of the United States Constitution." *Id.*[1]

The court then addressed this Court's decision in *Weaver*, which involved an *ex post facto* challenge to a statutory reduction in the number of good time credits

---

[1] There is an acknowledged split of authority in the Courts of Appeal and state courts over the issue whether prison regulations and parole guidelines are "laws" for *ex post facto* purposes. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari*); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the continuing split of authority); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the *federal* parole guidelines).

available for award to Florida inmates for good behavior. The court pointed out that this Court in *Weaver* rejected the argument that the statutory reduction in the amount of available good time credits was offset – for *ex post facto* purposes – by new opportunities to earn equal or even greater good time at prison officials' discretion. App. 16a-17a. Instead, this Court reasoned that Florida inmates were disadvantaged by the change because, even if they obeyed all prison regulations and completed all work assignments, the credits they received would be reduced and they could only make up the difference by satisfying extra conditions that previously had not existed. 450 U.S. at 35. The Kansas Supreme Court also examined a district court decision in *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981), which found an *ex post facto* violation when Oklahoma altered its good time credit system to require that such credits be earned, rather than automatically awarded.

The court opined that Stansbury's "position is similar to those in *Weaver* and *Spradling*." App. 18a. The court concluded that the 100% withholding of good time credits toward parole eligibility for Stansbury's refusal to participate in the SATP was both retrospective and disadvantaged Stansbury. *Id.* The court then reached the same conclusion with respect to the change in calculating an inmate's conditional release date by requiring that good time credits be actually earned. "Again, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment, and it disadvantaged the offender affected by it." App. 19a.

Lastly, the Kansas Supreme Court considered whether this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), affected the preceding conclusions. In *Morales*, this Court rejected an *ex post facto* challenge to a statutory amendment that lengthened the time between parole hearings in California for certain categories of inmates. The Kansas Supreme Court opined

that *Morales* "does refine the focus of the *ex post facto* analysis," App. 20a, by inquiring not whether the change "disadvantages" an inmate but, rather, whether the change alters the definition of criminal conduct or increases the penalty for the crime. Nonetheless, the court asserted that *Morales* does not affect the outcome in this case. First, the court opined that the change in calculating the conditional release date necessarily increases the punishment for an inmate's crime and is thus an *ex post facto* law even under *Morales*. App. 20a. Second, although the court acknowledged that the parole eligibility question "is much closer," *id.*, it still concluded that the amended regulation was an *ex post facto* law. The court reasoned that

> the amendment we deal with in this case goes beyond merely allowing the petitioner an opportunity to take advantage of provisions for an earlier release date. The amended regulation actually forces the petitioner to engage in the required program or risk the loss of good time credits which would automatically be earned under the old system. As a result, it has a very direct effect on the petitioner's parole eligibility and also constitutes an *ex post facto* application of law. App. 21a.

Chief Justice McFarland dissented without opinion. App. 26a.

b. *Bankes v. Simmons, et al.*

Relying on its decision in *Stansbury v. Hannigan*, the Kansas Supreme Court agreed with Bankes' claim that application of the revised parole eligibility and conditional release regulations to him violated *ex post facto* principles. The court pointed out that its *Stansbury* decision addressed and decided the same issue, but added that

> trial judges are aware of conditional release dates and how they are computed. When the defendant was sentenced, most trial judges would have considered the maximum time the defendant would have to serve in setting the sentence. App. 45a.

Thus, the court concluded that, "[f]or the reasons set forth in *Stansbury*, the application of K.A.R. 44-6-124 by KDOC to Bankes, due to his refusal to participate in the SATP, violates the ban on *ex post facto* laws. . . . " App. 45a. Chief Justice McFarland again dissented from the court's *ex post facto* holding. App. 46a ("I dissent from the majority opinion's determination that K.A.R. 44-6-124 constitutes an *ex post facto* law in reliance upon *Stansbury v. Hannigan*").

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court's Decisions Are Contrary To Decisions Of Federal Courts Of Appeal And Other State Courts Of Last Resort

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles

1. The Kansas statutes and prison regulations at issue in these cases are not unique. Indeed, *ex post facto* challenges to changes in good time statutes and regulations have been relatively common since this Court's potentially sweeping decision in *Weaver v. Graham*, 450 U.S. 24 (1981). In *Weaver*, this Court invalidated a Florida good time credit statute that reduced the amount of credits available for good behavior, *i.e.*, an inmate behaving in the same fashion received more good time credits before the statute was changed. This Court itself has

decided several other *ex post facto* cases since *Weaver*, arguably narrowing the application of *Weaver* in perhaps all of those cases. *See Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); and *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997)

Several post-*Weaver* lower court decisions have rejected *ex post facto* challenges to statutory and regulatory changes in the awarding of good time credits, often in reliance upon later decisions such as *Collins* and *Morales*. *See, e.g., Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), *cert. denied*, 511 U.S. 1111 (1994); *In re Ramirez*, 39 Cal. 3d 931, 218 Cal. Rptr. 324, 705 P.2d 897 (1985), *cert. denied*, 476 U.S. 1152 (1986); *Chauvin v. Erickson*, 998 F.2d 617 (8th Cir. 1993); *cf. Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996) (change in work release program does not violate *ex post facto* prohibition); *United States v. Byrd*, 116 F.3d 770 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 354, 612 (1997) (change in sentencing guidelines after defendant committed crime but before defendant violated probation does not violate *ex post facto* prohibition).

Other decisions have invalidated such changes on *ex post facto* grounds, almost always relying quite heavily on *Weaver*, as did the Kansas Supreme Court in these cases. In addition to the Kansas decisions at issue here and in the related petition, *McKune, et al. v. Steltzlen*, No. 98-___, see, for example, *Knuck v. Wainwright*, 759 F.2d 856 (11th Cir. 1985); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981); *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991); *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981); *Piper v. Perrin*, 560 F. Supp. 253 (D.N.H. 1983); *cf. Knox v. Lanham*, 895 F. Supp. 750 (D. Md. 1995) (changes in work release requirements are *ex post facto* violation), *aff'd*, 76 F.3d 377 (4th Cir. 1996).

2. A preliminary issue that the Kansas Supreme Court addressed in these cases and on which there is an acknowledged split of authority is whether *ex post facto*

prohibitions even apply to prison or parole regulations, as opposed to legislative enactments. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari* with respect to that issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the split); *Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (noting the split); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the federal parole guidelines); Thomas K. Landry, *"Punishment" And The Eighth Amendment*, 57 Ohio St. L. J. 1607, 1658-59 (1996) (noting the uncertainty and concluding that the possibility of the Court limiting the *Ex Post Facto* Clause's application to statutory amendments "cannot be ignored, especially in light of the Court's recent constriction of ex post facto doctrine").

All of this Court's *ex post facto* decisions cited above involved amendments to state statutes, not changes in prison or parole regulations, and there are clear statements in this Court's cases that the *Ex Post Facto* Clause "has been interpreted to pertain exclusively to *penal statutes*." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (emphasis added) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995)); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes. . . . "). Thus, contrary to the Kansas Supreme Court, some courts have concluded that prison and parole regulations are not "Laws" for *ex post facto* purposes. *See, e.g., Bailey v. Gardebring*, 940 F.2d 1150, 1155-57 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 503 U.S. 952 (1992); *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir. 1988); *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992).

This issue alone merits this Court's review, and these Kansas cases provide an appropriate vehicle for resolving the question. The Kansas Supreme Court addressed and decided this federal question on the merits, and resolution of the issue could be determinative of the outcome in both of these cases.

3. On the merits of the *ex post facto* question, the decisions invalidating changes in the awarding of good time credits, like the Kansas Supreme Court's decisions in these cases, rely heavily on this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981). In particular, the cases rely upon this Court's statement that the two critical elements of an *ex post facto* claim are that the law "must be *retrospective*, that is, it must apply to events occurring before its enactment, and it must *disadvantage* the offender affected by it." 450 U.S. at 29 (emphasis added). Continuing reliance upon *Weaver*, however, is problematic for several reasons.

One problem is that the concepts of retrospectivity, and especially "disadvantage," have almost unlimited potential breadth. This Court recognized in *California Dept. of Corrections v. Morales*, that some of the Court's prior *ex post facto* decisions emphasize the "disadvantage" concept, but then concluded that such

> language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. 514 U.S. at 506 n. 3.

Contrary to the Kansas Supreme Court in these cases, a number of federal Courts of Appeal and at least one state supreme court have rejected *ex post facto* challenges

in essentially identical circumstances. Generally, they have been critical of *Weaver* or have largely disregarded it in so doing. For example, in *In re Ramirez*, 705 P.2d 897 (Cal. 1985), the California Supreme Court rejected *ex post facto* challenges to statutory changes in the awarding, withholding and forfeiture of good time credits that, in most respects, are indistinguishable from the changes at issue in these Kansas cases. In particular, the changes in California law altered the types of infractions that could give rise to loss of good time credits, increased the punishment for disciplinary offenses, punished misbehavior during an assigned activity by withholding both good behavior and participation credits, and eliminated prior limits on the amount of credits subject to forfeiture during a given time period. 705 P.2d at 899.

The California Supreme Court examined *Weaver* in detail, criticizing the case's emphasis on the "disadvantage" concept, 705 P.2d at 900 ("If we were unencumbered we would be tempted to find that any disadvantage stems from petitioner's own action and the 1982 amendments are not disadvantageous on their face"), but nonetheless upholding the California statutory changes on the ground that they were not "retrospective" under *Weaver*. Rather, the court concluded that "the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective." 705 P.2d at 901. In a statement that describes these Kansas cases perfectly, the California Supreme Court observed that

> There is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence – the issue in *Weaver* – and an increase in sanctions for *future misbehavior* in prison – which is at issue here. Here, petitioner's opportunity to earn good behavior and participation credits is unchanged.

> All that has changed are the sanctions for prison misconduct. 705 P.2d at 901.

The court also emphasized the importance of the *ex post facto* issue in prison administration, correctly pointing out that

> From the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties. *Id.*

Lastly, the California Supreme Court observed that the rules affecting prison misconduct are "too contingent and remote" to have a significant influence on defendants and trial courts at the time of sentencing and that, in any event, the inmate in this case "had fair warning" of the new sanctions. *Id.* at 902. The Eighth Circuit has reached the same result. *See Chauvin v. Erickson*, 998 F.2d 617 (8th Cir. 1993) (finding that a new statute requiring inmates to perform work assignments in order to earn good time credits rather than automatically receiving credits for good behavior did not violate the *Ex Post Facto* Clause).

At least two Court of Appeals decisions have rejected *ex post facto* challenges to changes in good time credits and work release opportunities that in particular affected sex offenders, like the respondents in these Kansas cases. In *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), the Fourth Circuit upheld a change in prison regulations that made incarcerated sex offenders' failure to provide blood samples for a DNA data bank a new prison infraction that would result in the loss of good time credits.[2] The inmates in *Ewell* argued that the change was retrospective

---

[2] *See also Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (rejecting constitutional challenges to the DNA sampling itself); *Gilbert v. Peters*, 55 F.3d 237 (7th Cir. 1995) (same); *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996) (same).

and disadvantaged them within the meaning of *Weaver*, but the Fourth Circuit relied instead on this Court's later decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), which purported to narrow the concept of "disadvantage" to changes altering the definition of criminal conduct or increasing the punishment for the crime. 11 F.3d at 485.

The Fourth Circuit proceeded to reject the *ex post facto* claim for a number of reasons. First, the court observed that

> Reasonable prison regulations are not frozen at the time of each inmate's conduct, but rather, they may be subject to reasonable amendments as necessary for good prison administration, safety and efficiency, without implicating *ex post facto* concerns. 11 F.3d at 485-86.

Next, the court pointed out the DNA data bank statute was not penal in nature and that the total amount of good time credits available for good conduct had not changed. *Id.* at 486. The court correctly declared that an inmate "has no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." *Id.* Thus, in the court's view, the regulations only increased the punishment for future misconduct constituting a violation of prison regulations; they did not constitute additional punishment for the original crime. *Id.* at 487. The court concluded that

> In summary, the good conduct credit system in this case has remained constant, unlike the circumstances in *Weaver*, and prison punishment was adopted to apply to existing inmates prospectively for infractions of reasonable prison regulations. *Id.*

Similarly, in *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996), the inmate was a convicted sex offender who might have qualified for a work release program under regulations in effect when he was convicted and sentenced.

Later, however, the regulations were amended to prohibit sex offenders from participating in work release programs unless they successfully completed a treatment program and admitted their sex offenses. *Id.* at 1161. The First Circuit rejected the inmate's *ex post facto* challenge to the new regulation.

First, the court pointed out the split of authority in the Circuits on the question whether prison regulations are "laws" for *ex post facto* purposes. *Id.* at 1162 & n. 10. The court did not, however, attempt to resolve the issue because it rejected the *ex post facto* claim on the merits. Largely ignoring *Weaver v. Graham* and instead relying on this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the First Circuit declared that the test is whether the change in regulations increased the penalty for the inmate's crime. 73 F.3d at 1162, 1163. Recognizing that the amended regulation subjected the inmate to a different and stricter regime than when he committed his crime, the court nonetheless found no *ex post facto* violation because the change did not affect the length of the inmate's sentence or his parole options. *Id.* at 1163. The First Circuit concluded by emphasizing that

> The Ex Post Facto Clause does not encourage close scrutiny by the federal courts of ongoing procedural or operational changes in prisons to coordinate treatment, promote security, and protect the public safety. *Id.*

Thus, unlike the lower court decisions that have followed this Court's more recent *ex post facto* decisions such as *Collins* and *Morales*, the Kansas Supreme Court adhered to the sweeping approach this Court first suggested in *Weaver*. As indicated above, the Kansas Supreme Court is not alone in continuing to rely on *Weaver*. This Court itself did so in part in its most recent *ex post facto* decision involving good time credits, *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997). With all due respect, petitioners request that this Court grant review

in this case to clarify whether, and if so how, *ex post facto* principles apply to prison *regulations* affecting good time credits.

B. The Kansas Supreme Court's Decisions Address Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance

As the preceding discussion demonstrates, these Kansas cases and the *ex post facto* issues they raise are by no means rare or unique.[3] Under existing constitutional jurisprudence, every change in prison regulations governing the conduct of inmates is a potential *ex post facto* problem. Moreover, it is beyond dispute that the States and the federal government have compelling interests both in maintaining order and discipline in their prisons and in protecting society from dangerous, incarcerated offenders who may some day be released. Currently, however, it is unclear to what extent prison officials may address these problems other than on a purely prospective basis.

As explained above, several decisions – including these Kansas cases – have invalidated changes in statutes or regulations affecting good time credits, while several other decisions have rejected the very same challenges. The reasoning behind the decisions rejecting and upholding such challenges cannot be reconciled. Given the importance of the inmates' interests and the serious prison administration and safety concerns present in these cases, it is appropriate for this Court to intervene

---

[3] As Justice White noted, *ex post facto* issues regarding amended parole or prison regulations, are "likely to arise frequently." *Bailey v. Noot*, 503 U.S. 952, 953 (1992) (dissenting from the denial of *certiorari*).

and provide additional guidance to the lower courts and prison officials at this time.

The *ex post facto* issues that arise in these Kansas cases are a source of controversy across the country, and the answers to the questions are of extreme importance to the administration of today's large prison populations. A report recently released by the United States Department of Justice indicates that our nation's adult prison population has risen to an all-time high of more than 1.7 million inmates, with much of the increase fueled by inmates serving longer terms for violent crimes. *See, e.g.*, Fox Butterfield, *Prison population posts gain for '97*, Kan. City Star A12 (Aug. 9, 1998); Associated Press, *Longer incarcerations produce growth in U.S. prison population*, Kan. City Star A3 (Aug. 3, 1998).

Prison officials often need the flexibility to amend and refine the rules and regulations that govern inmates' conduct. But if every change or amendment is an *ex post facto* violation when applied to inmates already in the prison, then prison officials' hands will be tied. Moreover, *ex post facto* issues with respect to good time credits tend to be most significant for the inmates serving the longest prison terms. Often these inmates are the most serious and violent offenders in the prison systems. Given the extreme public importance of the questions presented, the compelling interests at stake on both sides of these issues, and the sharp split of authority in the federal Courts of Appeal and the state courts on these issues, these cases warrant this Court's plenary review.

II. The Kansas Supreme Court's Decisions Are Contrary To This Court's *Ex Post Facto* Decisions

The decisions addressing the constitutionality of changes in prison regulations and good time credit statutes have turned upon the lower courts' understanding of this Court's *ex post facto* decisions, in particular *Weaver*

v. Graham, 450 U.S. 24 (1981), and to a lesser extent *Dobbert v. Florida*, 432 U.S. 282 (1977); *Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); and *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997).

None of the cases question the proposition that inmates have constitutional protection from retroactive increases in their punishment, and the State of Kansas does not question that fundamental constitutional principle. This Court's decisions, however, do not support the result the Kansas Supreme Court reached in these cases.

1. First, and most importantly, the Kansas Supreme Court erred in concluding that prison regulations are subject to *ex post facto* restrictions, at least in these cases. Although the Kansas Department of Corrections promulgated the regulations pursuant to statutory authority, the controlling Kansas statutes are clear that good time credits shall be "earned." The Department of Corrections lacked the power to provide otherwise, which simply proves the point that the *Ex Post Facto* Clause should be limited, as this Court's cases repeatedly have recognized, to the application of *penal statutes*. This issue, however, has divided the lower courts. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari* with respect to that issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the split); *Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (noting the split); Landry, 57 Ohio St. L. J. at 1658-59.

For the past sixty years, this Court's *ex post facto* decisions have all involved amendments to *statutes*, not prison regulations. Thus, the *ex post facto* challenges in *Lindsey v. Washington*, 301 U.S. 397 (1937); *Weaver*, 450 U.S. at 25; *Miller v. Florida*, 482 U.S. at 434-35; *Morales*, 514 U.S. at 503; and *Lynce*, 117 S. Ct. at 893, all involved amendments to state penal statutes. Similarly, this Court has expressly declared in recent years that the *ex post facto*

prohibition "has been interpreted to pertain exclusively to penal statutes." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990). ("Although the Latin phrase *'ex post facto'* literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes. . . . ").

This Court also has observed that, prior to the sentencing guidelines era, the lower federal courts generally upheld revisions in the federal parole guidelines against *ex post facto* challenges. *See Miller v. Florida*, 482 U.S. 423, 434 (1987). The Court pointed out that the lower courts reached that conclusion for three reasons: (1) federal parole guidelines are not "laws" for *ex post facto* purposes; (2) the parole guidelines merely "rationalize the exercise of statutory discretion"; and (3) retrospective application of the parole guidelines does not result in a more onerous punishment. 482 U.S. at 434-35. With all due respect, all three of those rationales, which were widely endorsed and followed by the lower federal courts, apply to the Kansas regulations at issue in these cases.

The conditional release and parole eligibility statutes in Kansas have not changed since respondents committed their sexual crimes, nor have respondents' sentences changed, and they make no such claims. Moreover, not even the total amount of good time credits available to respondents has changed. Rather, respondents are complaining about changes in administrative regulations designed to implement statutory directives and to maintain prison discipline and safety. With respect to conditional release dates, those regulations originally adopted an approach contrary to the plain statutory language and to the unwarranted benefit of inmates such as respondents. With respect to parole eligibility dates, the regulations have simply further refined what constitutes good

behavior and the sanctions for misconduct. But there has been no change in the Kansas penal statutes that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dept. of Corrections v. Morales*, 514 U.S. 506 n. 3 (1995); *see also Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977) (*ex post facto* question is whether the statutory amendment changes "the quantum of punishment").

2. Second, this Court's decision in *Weaver*, on which the Kansas Supreme Court relied almost exclusively, is distinguishable. *Weaver* involved a statute that reduced the amount of good time credits available even if the inmate complied with good behavior requirements. *See* 450 U.S. at 26. In *Weaver*, after the statutory amendment, the inmates would have received significantly less good time credit for the very same good behavior. *See id.* at 33 ("On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks.").

That is not true in these Kansas cases. The amended Kansas regulations do not take away the opportunity for the same total good time credits as existed before the changes. Rather, they simply require the earning of good time credits toward conditional release, as the controlling statute requires, and they further refine the definition of good behavior and the consequences of bad behavior with respect to parole eligibility. The Kansas regulations do not reduce the "gain time available solely for good conduct." *Id.* at 35.

Moreover, three Justices in *Weaver* concurred in the judgment but expressed reservations about constitutionalizing the States' good time credits systems. Justice Blackmun wrote that, "[w]ere the Court writing on a clean slate," he would reject the *ex post facto* claim, analyzing it as follows:

> (a) the 1978 Florida statute does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute. 450 U.S. at 36-37.

Chief Justice (then Justice) Rehnquist also concurred, declaring the case to be "a close one," and asserting that states should retain flexibility in revising good time credit systems, especially if reductions in good time credits for good conduct are offset by increases in the availability of credits that could be earned for more than good conduct. *Id.* at 37-38.

Other decisions of this Court invalidating statutory amendments on *ex post facto* grounds have clearly involved detrimental changes in the penal statute itself, and without regard to any future behavior of the inmate. *See, e.g., Lindsey v. Washington,* 301 U.S. 397 (1937) (invalidating retroactive application of sentencing statute that required mandatory 15-year sentence rather than permitting sentence up to 15 years); *Miller v. Florida,* 482 U.S. 423 (1987) (finding *ex post facto* violation when state applied new sentencing guidelines identifying presumptive sentence of 5½ to 7 years to defendant, rather than 3½ to 4½ presumptive sentence applicable at the time of the offense). On the other hand, the Court has rejected an *ex post facto* challenge when the statutory amendment affects only the *opportunity* to obtain early release, but not the actual sentence itself. *California Dept. of Corrections v. Morales,* 514 U.S. 499 (1995) (no *ex post facto* violation when legislature amended parole provisions to increase the time between parole hearings for certain categories of inmates).

3. This Court's most recent *ex post facto* decision in the prison context also raises serious concerns about the Kansas Supreme Court's decisions in these cases. In *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997), this Court found an *ex post facto* violation when Florida amended a statute, with respect to certain categories of inmates such as attempted murderers like Lynce, to retroactively cancel credits previously awarded and used based on overcrowding of the prison system. 117 S. Ct. at 893. Because of the credits he accumulated under the prior version of the statute, Lynce had been released from incarceration. After the statute was amended to cancel the overcrowding credits, state authorities reincarcerated Lynce. Thus, this Court phrased the question as whether the application of the amendment cancelling the credits "after they had been awarded – indeed, after they had resulted in the prisoners' release from custody – violates the *Ex Post Facto* Clause of the Federal Constitution." *Id.* Not surprisingly, the Court found an *ex post facto* violation.

But both the Court's careful phrasing of the question and the concurring opinion by Justice Thomas emphasize the narrow and specific nature of the holding in *Lynce*. Justice Thomas concurred, joined by Justice Scalia, to drive home the relatively unique circumstances of the case:

> Under these narrow circumstances, I agree with the Court that the State's retroactive nullification of petitioner's previously accrued, and then used, release credits violates the Constitution's ban on *ex post facto* lawmaking. I do not, however, join the majority's discussion of *Weaver v. Graham*, which I find unnecessary to the resolution of this case. In *Weaver*, we considered whether a statute that merely altered the availability of "good conduct" credits ran afoul of the *Ex Post Facto* Clause. The present case involves not merely an effect on the availability

> of *future* release credits, but the retroactive elimination of credits already earned and used. 117 S. Ct. at 900 (internal citations omitted).

4. Lastly, the Kansas Supreme Court's opinion relies almost exclusively on this Court's decision in *Weaver*. Thus, even assuming that prison regulations implicate the *Ex Post Facto* Clause, the Kansas Supreme Court's decision hinges upon the proposition that the primary question is whether the *effect* of the amended regulations is to *disadvantage* inmates. But this Court's recent decisions addressing whether particular provisions amount to "punishment" for constitutional purposes take a very different view.

Indeed, in the sexual predator context and in double jeopardy challenges to civil forfeiture and civil sanctions, this Court does not even begin with an "effects" analysis, but instead first considers legislative purpose. *See, e.g., Hudson v. United States*, 522 U.S. ___, 118 S. Ct. 488, 493-95 (1997) (first question is whether enactment is non-punitive on its face or has non-punitive purpose); *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997) (same); *United States v. Ursery*, 518 U.S. 267 (1996) (same); *cf. Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 897 (1997) (discussing to what extent legislative purpose may be relevant to the *ex post facto* analysis). Moreover, this Court has held that "whether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n. 14 (1995). *See also* Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L. J. 2143 (1996). The Kansas Supreme Court's approach, however – based on this Court's decision in *Weaver* – does not provide any limit to the reach of the *Ex Post Facto* Clause in the prison context, since many changes in prison regulations arguably have a disadvantageous "effect" on inmates, at least from the inmates' perspective.

In these Kansas cases, the purposes behind the regulatory changes are not punitive. The conditional release date regulation was amended to conform to the controlling statutory directive that good time credits be earned. The parole eligibility regulations were amended to increase the incentives for inmates to participate in important programs available in prison, such as sexual abuse treatment programs. Overall, these regulatory changes are designed to improve prison safety, discipline and order, and to better protect the public when these inmates are released, not to impose additional criminal punishment on inmates.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant this petition for writs of *certiorari* and set these cases for plenary review, in order to resolve the splits of authority in the lower federal and state courts.

Respectfully submitted,

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson St., Suite 400
Topeka, Kansas 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General

STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)

301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(785) 296-2215

August, 1998

APPENDIX INDEX

Page

APPENDIX A

Stansbury v. Hannigan 1a

Bankes v. Simmons 27a

APPENDIX B

The Kansas Supreme Court Orders Denying Rehearing 47a

APPENDIX C

The Kansas Supreme Court Orders Denying Recall Of The Mandates 49a

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 79,384

RAYMOND F. STANSBURY,
Appellee/Cross-Appellant,

V.

ROBERT D. HANNIGAN, *et al.*,
Appellants/Cross-Appellees.

SYLLABUS BY THE COURT

1.

The United States Constitution's ex post facto prohibition forbids legislative enactment of any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.

2.

Two critical elements must be present for a criminal or penal law to be ex post facto. It must be retrospective, that is, it must apply to events occurring before its enactment, and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable.

3.

Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

4.

Kansas Administrative Regulations, when adopted, have the force and effect of statute. The Kansas Department of Corrections, in adopting regulations governing inmate conduct in the penal institutions of this state, acts as a quasi-legislative instrumentality exercising delegated legislative power. Thus, the regulations adopted are within the ambit of the Ex Post Facto Clause of the United States Constitution.

5.

When an inmate is afforded the opportunity to possess personal property, he or she enjoys a protected interest in the ownership of that property that cannot be infringed without due process. However, the inmate has no protected right to possession of the property while in prison.

6

While states may under certain circumstances create liberty interests on behalf of inmates, these interests will be generally limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

7.

The record is examined in this case involving good time credits for prisoners, and it is held: (1) The 1993 amendment to K.A.R. 44-6-124 constitutes an ex post facto application of law to the petitioner and those similarly situated; and (2) the incentive level system established by Internal Management Policies and Procedures 11-101 does not violate due process.

Appeal from Leavenworth district court, MARTIN ASHER, judge. Opinion filed June 5, 1998. Affirmed.

Jeff Cowger, special assistant attorney general, and *Carla J. Stovall*, attorney general, were on the briefs for appellants/cross-appellees.

Raymond F. Stansbury, appellee/cross-appellant, was on the briefs pro se.

The opinion of the court was delivered by

DAVIS, J.: This appeal by the Department of Corrections and cross-appeal by the petitioner inmate involve two questions. The first question is whether the withholding of good time credits from the petitioner under regulations amended after the petitioner's crime was committed violated the Ex Post Facto Clause of the United States Constitution. The second question is whether internal management policies adopted after the petitioner's sentence, resulting in his loss of privileges, violates the petitioner's due process rights under the United States Constitution. Both matters are questions of first impression before this court. We transferred this case from the Court of Appeals. Our jurisdiction is based upon K.S.A. 20-3017 and K.S.A. 60-2101(b).

The petitioner was tried by jury and convicted on May 10, 1991, of the charge of rape, which arose out of circumstances occurring on September 9, 1990. He was sentenced to the Secretary of Corrections for a term of 10 to 20 years. He began serving his indeterminate sentence on May 18, 1991.

Prior to April 1994, the petitioner earned 100% of his authorized good time credits by remaining free of any

prison offenses and by the discretionary grant of good time credits by the unit team manager. See K.A.R. 44-6-124 (1989). After April 1994, based upon the 1993 amendment to K.A.R. 44-6-124, 100% of the petitioner's potential good time credits (120 days) were withheld for his failure to sign an amended Sex Abuse Treatment Program (SATP) agreement. In August 1994, another 120 days of good time credits were withheld. Sixty days of good time credits were withheld in April 1995, and 120 days more were withheld in October 1995. In January 1996, 120 days of good time credits were again withheld.

Before the adoption of Internal Management Policies and Procedures (IMPP) 11-101 in 1996, the petitioner was entitled and had certain privileges during his incarceration, including but not limited, to the following: ownership and possession of a personal television and handicrafts, use of outside funds, canteen expenditures up to $140 a month, approved visitors, and incentive pay. After the adoption of IMPP 11-101, inmates were required to earn these privileges by generally remaining free of offenses and demonstrating a willingness to participate in recommended programs including, in the petitioner's case, the SATP. Based upon the petitioner's refusal to participate in SATP, he was placed at RAPP 11-101 Level I. At this level he was no longer allowed a personal television but did have access to general television, canteen expenditures were limited to $20 per month, incentive pay was reduced, and visitors were limited to immediate family.

After exhausting his administrative remedies, the petitioner filed a petition for writ of habeas corpus. He contended that the application of the 1993 amendment to

K.A.R. 44-6-124 to him constituted an ex post facto violation and violated due process and that the withholding of good time credits based on his failure to comply with the SATP violated his Fifth Amendment rights. He also contended that the change in his prison conditions and loss of privileges as the result of his classification under IMPP 11-101, constituted a violation of the Ex Post Facto Clause of the United States Constitution.

The trial court narrowed the issues in pretrial conference to the following: the alleged Fifth Amendment violation, the ex post facto nature of the 1993 amendment to K.A.R. 44-6-124, the ex post facto nature of the application of the IMPP 11-101 system, and a claim that the actions of the respondents violated the Eighth Amendment.

The trial court held that the 1993 amendment to K.A.R. 44-6-124(g)(6), as applied to the petitioner who was sentenced in 1991, was an ex post facto law and void under the United States Constitution. The trial court denied any further relief. The Department of Corrections with other named respondents appeal, and the petitioner cross-appeals. For the reasons set forth below, we affirm the trial court.

There are two aspects of this appeal. The first aspect involves good time credits under state statutes and the Kansas Administrative Regulations. The Department of Corrections appeals the trial court's determination that the 1993 amendment to K.A.R. 44-6-124(g)(6), as applied to the petitioner, is an ex post facto law. The petitioner cross-appeals, contending that the 1993 amendment violated his due process rights and that the trial court erred

in determining that the withholding of good time credits for the petitioner's failure to participate in the SATP did not violate his rights under the Fifth Amendment to the United States Constitution.

The second aspect of this appeal involves IMPP 11-101, adopted by the Department of Corrections in 1996 and applied to the petitioner, who was convicted and sentenced in 1991. The petitioner contended before the trial court that such application was ex post facto, although he has abandoned this claim on appeal. For the first time on appeal, he contends that application of the IMPP violates his due process rights. We consider this an important constitutional issue and elect to treat his contention even though he failed to address the matter before the trial court. See *State v. Bell*, 258 Kan. 123, 126, 899 P.2d 1000 (1995).

Good Time Credits

In Kansas, the award of good time credits is authorized by law. See K.S.A. 21-4722; K.S.A. 22-3725. The manner in which such credits are earned, awarded, forfeited, withheld, and accumulated by individual inmates is governed by duly authorized regulations adopted by the Department of Corrections. Good time credits serve a useful purpose within our penal system by providing incentives for good behavior and inmate participation in remedial and rehabilitation programs, as well as sanctions for lack of performance and disobedience.

Two important dates are affected by the awarding, forfeiting, and withholding of good time credits. The first date is the date on which an inmate becomes eligible to

be considered for parole. See K.S.A. 22-3717. The second date is the conditional release date which is the date upon which an inmate is entitled to be released from incarceration. See K.S.A. 22-3718; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222 (1987).

Parole Eligibility

K.A.R. 44-6-124 (1989), in effect when the petitioner was convicted, provided in pertinent part:

> "For parole eligibility, award of good time credits shall be limited as follows:
>
> "(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.
>
> "(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.
>
> "(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.
>
> "(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.
>
> "(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior,

> and on other performance factors related to effective rehabilitation of the inmate."

The regulation further provided that the unit team had the discretion to refuse to award all or part of *that portion of credits for which it had discretion,* or 20% of the total available for cooperation or non-cooperation, including the inmate's nonparticipation in programs. K.A.R. 44-6-124(b) (1989).

According to the provisions of K.S.A. 22-3717(a), an inmate "shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits." Under the provisions of the regulation in effect at the time of the petitioner's conviction, good time credits earned were applied to the inmate's minimum sentence to determine the date he or she was eligible for parole. The more good time credits earned, the earlier the inmate became eligible for parole. As indicated above, the petitioner in this case earned 100% of available good time credit until application of the 1993 amendment to K.A.R. 44-6-124 discussed below.

Conditional Release Date

K.A.R. 44-6-108(c) (1989), which was also in effect when the petitioner was sentenced, stated in pertinent part that "[t]o establish the conditional release date, good time credits, not forfeited, *shall be presumed earned* and shall be applied to the maximum sentence term when first computed." (Emphasis added.) Thus, an inmate's conditional release date was computed based upon the presumption that he or she would earn all good time credits available under the system then in effect. These

good time credits were then applied to the inmate's maximum sentence, thereby fixing the time the inmate was entitled to be released from incarceration, the inmate's conditional release date. Any forfeiture of good time credits because of institutional offenses after parole eligibility had been reached would result in the forfeited time being added to the inmate's conditional release date up to the maximum sentence, thereby extending the time the inmate would be incarcerated. See K.A.R. 44-6-125(b) (1989).

Thus, credits for parole eligibility had to be actually earned under the system as it existed at the time the petitioner was convicted, while good time credits for the conditional release date were awarded at the outset of his sentence. For the purposes of earning parole eligibility, an inmate with no class I offenses during the review period would receive at least 50% of the good time credits for that period. An inmate with no class I, II, III, or IV offenses was guaranteed to receive at least 80% of the allocated good time credits. The balance of the credits were discretionary and could be awarded or not awarded for a variety of reasons, including failure to constructively participate in a program. See K.A.R. 44-6-124(b) (1989).

In addition, the petitioner's conditional release date was set at the beginning of his sentence based upon the presumption that he would earn all available good time credits authorized by 22-3725. See K.A.R. 44-6-108 (1989). As the respondents state in their brief on appeal, "[a]t the time of petitioner's crime, pursuant to K.S.A. 22-3725, he was entitled to have the opportunity to be able to earn a potential total of ten (10) years of good time credit off of

his sentence." Thus, the petitioner's conditional release date was 10 years less than the maximum sentence of 20 years.

The 1993 amended version of K.A.R. 44-6-124(a) provided:

> "[f]or crimes, other than class A crimes, committed prior to July 1, 1993, an inmate may earn good time credits which shall be subtracted from the minimum sentence in order to establish a parole eligibility date or the maximum sentence in order to establish the conditional release date."

Moreover, K.A.R. 44-6-124(g) (1994) provided a marked change in awarding and withholding good time credits:

> "(g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.
>
> "(1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.
>
> "(2) A guilty finding of a class II disciplinary offense shall result in the withholding of a minimum of 25% but not more than 50% of the good time credits available for that program classification review period.
>
> "(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period. . . .

. . . .

"(6) A pattern of refusal by an inmate to constructively work or participate in assigned programs *shall* result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail." (Emphasis added.)

The effect of the change on the petitioner was substantial. The trial court illustrated this point by incorporating into its memorandum decision the authorities and ruling of its earlier decision on the same issue, wherein it stated:

> "Under the prior regulations, an inmate without a disciplinary violation was automatically awarded 80% of the good time credits available for the review period with the remaining 20% left to the discretion of the unit team. Under the current regulations, an inmate without a disciplinary violation, could lose 100% of the good time credit available because of failure to participate in a program; which is exactly the plight of the petitioner."

The plight of this petitioner is the same. He refused to participate in the SATP, and under the provisions of K.A.R. 44-6-124(g)(6), his failure to participate "*shall* [and did] result in the withholding of 100% of the good time credits for that program classification review period." (Emphasis added.) Under the system in effect when the petitioner was sentenced he, without offenses, was guaranteed 80% good time credits, while under the 1993

amendment, without offenses, 100% of his good time credits were withheld because of his failure to participate in the SATP. The change applied retrospectively, altering the method by which good time credits were awarded and forfeited or withheld. It is this withholding that altered penal provisions accorded by the grace of the Department of Correction [sic] in its regulations.

In addition to affecting his or her parole eligibility date, the application of K.A.R. 44-6-124 may also have an adverse affect upon an inmate's conditional release date. K.A.R. 44-6-124 provides that

> "[f]or crimes, other than class A crimes, committed prior to July 1, 1993, an inmate may earn good time credits which shall be subtracted from the minimum sentence in order to establish a parole eligibility date *or the maximum sentence in order to establish the conditional release date.*" (Emphasis added.)

Effective March 1, 1995, the Department of Corrections adopted K.A.R. 44-6-142 (1996 Supp.), which provided in part:

> "When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date."

The record is unclear whether good time credits were subtracted from the petitioner's maximum sentence prior to March 1, 1995, to establish his conditional release date based upon the withholding of 100% for his failure to

participate in the SATP. What is apparent is that in April 1994, pursuant to the 1993 amendment to K.A.R. 44-6-124, 100% of the petitioner's potential good time credits (120 days) were withheld for his failure to sign an amended SATP agreement. In August 1994, another 120 days of good time credits were withheld. Sixty more days of good time credits were withheld in April 1995, and 120 days more were withheld in October 1995. In January 1996, 120 days of good time credits were again withheld.

After March 1, 1995, good time credits would no longer be presumed but would have to be earned. However, in the petitioner's case, his failure to participate in the SATP resulted in the withholding of 100% of his good time credits. Thus, what was under the regulations in existence at the time the petitioner was sentenced a presumption that he earned all good time credits available, thereby setting his conditional release date, now becomes a matter that must be earned and is subject to 100% good time credits being withheld for failure to participate in the SATP. The respondents state in their brief:

> "At the time of petitioner's crime, pursuant to K.S.A. 22-3725, he was entitled to have the opportunity to be able to earn a potential total of ten (10) years of good time credit off of his sentence. The amendment to K.A.R. 44-6-124 did not change that, he still has the same amount of potential good time credit available, ten (10) years."

However, prior to the 1993 amendment, the petitioner's conditional release date was fixed by the presumption that all available good time credits were earned. This date

could only be changed if he lost credits for committing offenses.

The United States Constitution's ex post facto prohibition provides: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const., art. 1, § 9, cl. 3; see art. 1, § 10, cl. 1. Its prohibition forbids legislative enactment of any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed. In order for a law to be considered ex post facto, two critical elements must be present. The law must be retrospective, applying to events occurring before its enactment, and it must disadvantage the offender affected by it. *Weaver v. Graham,* 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). In *Weaver,* the United States Supreme Court noted:

> "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. at 30-31.

Political subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the Ex Post Facto Clause. 16A C.J.S., Constitutional Law § 409, p. 355. Administrative regulations adopted in accordance with the procedures set forth by the legislature have the force and effect of

law in Kansas. See K.S.A. 77-425. This statute provides in part:

> "Every rule and regulation other than a temporary rule and regulation which is filed by the state agency in the office of the secretary of state as provided in this act shall have the force and effect of law on and after the date prescribed in K.S.A. 77-426, and amendments thereto, until amended or revoked as provided by law and such amendment or revocation shall have become effective."

The Kansas Department of Corrections is a state agency. In adopting regulations governing the granting, withholding, and forfeiture of good time credits, it acts as a political subdivision exercising delegated legislative power. As such, its regulations adopted are within the ambit of the Ex Post Facto Clause of the United States Constitution.

Weaver addressed the question of whether a change in Florida's provisions for prison "gain-time credits" constituted an ex post facto law. The factual situation in *Weaver* is somewhat similar to the case at hand. Under Florida law, inmates were awarded a certain number of gain-time credits automatically simply for avoiding disciplinary infractions and for performing assigned tasks. 450 U.S. at 26. In 1978, however, the system was changed in that the number of gain-time credits awarded automatically was reduced, although extra gain-time credits were available to those inmates who performed meritorious and outstanding work. 450 U.S. at 26-27, 34-35.

The inmate in *Weaver* argued that this change in regulations constituted an ex post facto law, and the

United States Supreme Court agreed. 450 U.S. at 27-28. In reaching this conclusion, the Court noted that the availability of gain time is one determinant in an inmate's prison term and, thus, the prison term is altered when this determinant is changed. 450 U.S. at 32. The Court concluded that the Florida statute was applied retrospectively and further was disadvantageous to the petitioner and those persons similarly situated, saying:

> "On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison. . . . Here, petitioner is . . . disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." 450 U.S. at 33-34.

The Court in *Weaver* stated that it did not matter that Florida's new statutory scheme enabled the inmate to earn more good time credits through satisfying extra conditions. 450 U.S. at 35. The Court noted:

> "The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision [citation omitted], than he could for the same conduct under the new provision [citation omitted]. To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate,

> such as saving a life or diligent performance in an academic program." 450 U.S at 35.

Accordingly, the Court found that the new regulations were ex post facto as applied to Weaver. 450 U.S. at 36.

Weaver was cited by the United States District Court for the Western District of Oklahoma in another case similar to the one at hand. See *Spradling v. Maynard*, 527 F. Supp. 398 (W. D. Okla. 1981). In *Spradling*, the statutes in effect prior to September 1976 provided a system similar to that in Kansas where good time credits were automatically applied to an inmate's sentence, although they could later be forfeited for disciplinary infractions. Oklahoma then amended the system to one in which the inmate was forced to earn the credits. In finding that the change constituted an ex post facto law as applied to the complaining inmate, the court stated:

> "It is clear from a reading of the provisions of § 138, as they existed prior to September 8, 1976 and as they exist at this time, that the amendment of that provision in 1976 required an inmate to 'earn' credits by satisfying certain conditions, whereas previously such credits were automatic, subject only to being forfeited at a later date for disciplinary reasons. As in *Weaver*, the 1976 amendment made more onerous the punishment for crimes committed before its enactment. Thus, under *Weaver*, petitioner, and others similarly situated, are entitled to the benefits of § 138 as it existed prior to September 8, 1976, *i.e.*, the automatic "good time" credits against sentences imposed for crimes committed before September 8, 1976. . . . " 527 F. Supp. at 404.

The petitioner's position is similar to those in *Weaver* and *Spradling*. At the time the petitioner was sentenced, he would, absent disciplinary infractions, earn 80% of his available good time credits, with the remaining 20% subject to discretionary award by the unit team manager. K.A.R. 44-6-124 (1989). While this 20% may have been forfeited for failure to participate in rehabilitation programs, no provision within the regulations in effect at the time the petitioner was sentenced related to the forfeiture or withholding of all available good time credits for such failure. These good time credits were applied to the petitioner's minimum sentence of 10 years to determine his parole eligibility date.

After the adoption of the 1993 amendments to K.A.R. 44-6-124 which expressly applied to the petitioner, 100% of the petitioner's good time credits were mandatorily withheld based upon his refusal to participate in the SATP. See K.A.R. 44-6-124(g)(6). The result in the petitioner's case was to extend the time he would have to serve before being eligible for parole. Thus, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment and it disadvantaged the offender affected by it. See *Weaver*, 450 U.S. at 29.

Moreover, the 1993 amendment to K.A.R. 44-6-124(g)(6), in conjunction with the 1995 amendment to K.A.R. 44-6-142, changed the way the petitioner's conditional release date was determined. As the petitioner was convicted and began his sentence, he was presumed to earn all available good time credits or 10 years. See K.A.R. 44-6108(c) (1989); K.A.R. 44-6-142 (1989). After the 1995 amendment he was required to earn good time

credits, and his failure to participate in the SATP resulted in the loss of 100% of his good time credits as it related to his conditional release date. The effect upon the petitioner was to extend his conditional release date based upon his failure to earn good time credits because of his refusal to participate in the SATP. Again, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment, and it disadvantaged the offender affected by it. See *Weaver*, 450 U.S. at 29.

Does it matter that the 1993 amendment to K.A.R. 44-6-124(g)(6) uses the term "withholding" rather than "forfeiting"? In *Gilmore v. McKune*, 22 Kan. App. 2d 167, 169-70, 915 P.2d 779 (1995), the Court of Appeals found that there was a distinction between the withholding of good time credits and the forfeiture of good time credits, with the latter constituting a penalty but the former not doing so. The distinction by the Court of Appeals is that forfeited good time credits such as those for disciplinary actions may not be restored to the inmate while withheld good time credits may presumably be restored. However, whether the good time credits are withheld or forfeited, inmates under the prior system are still subject to a loss of such credits for their failure to participate in the SATP in that good time credits which have already been awarded to them are withheld. Therefore, as to the petitioner and others similarly situated, the Court of Appeals' decision in *Gilmore* does not apply.

The respondents argue that the recent decision of the United States Supreme Court in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995), changes the *Weaver* analysis and, therefore,

should change the result in this case. In *Morales,* the Court addressed a statutory change which lengthened the period of time between parole hearings. The Court determined that the application of the increased time between parole hearings to inmates whose crimes were committed before the change did not constitute an ex post facto violation. 514 U.S. at 514. In doing so, the Court refined the ex post facto analysis, stating that rather than focusing on whether the change in the law worked to the disadvantage of the inmate, the focus should be on whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. See 514 U.S. at 506-07, n.3.

Morales does refine the focus of the ex post facto analysis. However, *Morales* does not compel a contrary result with regard to the award of good time credits used to calculate conditional release in this case. The effect of the 1993 amendment was to force the petitioner to earn credits he had already been awarded, and for each good time credit the petitioner failed to earn, his conditional release date and, thus, the actual term of his punishment, would be extended. Thus, even under the *Morales* analysis, the application of the 1993 amendment to those good time credits used to calculate the petitioner's conditional release date would be ex post facto.

With regard to the award of good time credits used to calculate parole eligibility, the question is much closer. In *Morales,* the Court noted that the focus should not be on whether an amendment affects a prisoner's " 'opportunity to take advantage of provisions for earlier release.' " 514 U.S. at 506-07, n.3. This would seem to suggest that if the effect of the 1993 amendment on the good time credits

used to calculate parole eligibility is to merely alter the petitioner's opportunity to take advantage of provisions for early release, it does not constitute an ex post facto application of law. However, the amendment we deal with in this case goes beyond merely allowing the petitioner an opportunity to take advantage of provisions for an earlier release date. The amended regulation actually forces the petitioner to engage in the required program or risk the loss of good time credits which would automatically be earned under the old system. As a result, it has a very direct effect on the petitioner's parole eligibility and also constitutes an ex post facto application of law.

As a result, the district court was correct in determining that the application of the 1993 amendment to K.A.R. 44-6-124(g)(6) to the petitioner constituted an ex post facto application of law. The respondents' appeal must fail. Based upon our conclusion, we need not address the questions raised by the petitioner's cross-appeal regarding whether the 1993 amendment constitutes a denial of due process or a violation of the petitioner's Fifth Amendment rights.

Internal Management Procedures and Policies

The petitioner also contends in his cross-appeal that subjecting him to the IMPP 11-101 level system because of his failure to participate in the SATP violated his due process rights. In order to properly address this issue, some background on the level system created by IMPP 11-101 is necessary.

IMPP 11-101 is an internal management policy and procedure concerning offender privileges and incentives.

Under IMPP 11-101, inmates can earn certain privileges, including television ownership, handicrafts, participation in organizations, use of outside funds, canteen expenditures, property, incentive pay, and visitation. Under IMPP 11-101, there are several levels of privileges. At Level I, the level at which the petitioner was placed following his refusal to participate in the SATP, the inmate may not have a personal television but has access to general television. Inmates at Level I are limited in activities, have limited expenditures at the canteen up to $20, may earn up to 60¢ per day in incentive pay, and may receive visitors from immediate family. At Level III, the highest level for inmates, the inmate may purchase a personal television, spend up to $140 in the canteen on a more extensive list of items, and may have any approved visitor.

In order to move from level to level, the inmate must remain free of class I or class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for a full review cycle of a minimum of 120 days. An inmate may lose levels for disciplinary offenses and is automatically reduced to Level I in the event the inmate is terminated from a work program for cause, refuses to participate in a recommended program such as SATP, commits felony offenses or has serious disciplinary offenses.

When an inmate loses levels, property items which the inmate is no longer authorized to have are removed from the facility. The first time an inmate is removed from Level II or III to Level I, unauthorized items purchased by the inmate at the canteen such as televisions, sound equipment, and large appliances are stored for the inmate

at the facility and returned to the inmate when the inmate advances back to a level at which they are authorized. However, if the inmate is returned to Level I a second time or fails to advance to Level II at the earliest possible time, these items are removed from the facility.

When an item is removed from the facility, the inmate has the choice of having the item mailed to an address of the inmate's choosing at the inmate's expense or with the approval of the warden at the expense of the facility, donating the item to charity, having the property picked up by an authorized person, or having the property delivered to a local address by the facility upon the approval of the warden. At the time IMPP 11-101 was implemented on January 1, 1996, all inmates currently incarcerated were placed at Level III, the highest level available. At this level, the inmates enjoyed the same privileges that existed prior to implementation of IMPP 11-101.

The petitioner contends that as the result of his nonparticipation in the SATP, he was made subject to IMPP 11-101 and reduced to Level I, with the result being that certain privileges and property that he had been allowed were taken away. He contends that this violated due process.

As we have already noted, the petitioner did not raise this argument before the district court. Instead, he argued that subjecting him to IMPP 11-101 was an ex post facto application which he appears to have abandoned. Ordinarily, issues not raised before the trial court cannot be raised on appeal. *Ripley v. Tolbert*, 260 Kan. 491, Syl. ¶ 6, 921 P.2d 1210 (1996). However, we have recognized

an exception to this rule where consideration of the issue is necessary to serve the ends of justice or to prevent the denial of fundamental rights. See *State v. Bell*, 258 Kan. 123, 126, 899 P.2d 1000 (1995). As the due process issue raised in the petitioner's appeal is an important one, we now address it.

The first step in this analysis is to determine whether the petitioner's property interests were infringed upon. The petitioner contends that when he was reduced to Level I, his personal property was confiscated.

The Court of Appeals has held that when inmates are afforded the opportunity to possess personal property, they enjoy a protected interest in that property that cannot be infringed upon without due process. *Bryant v. Barbara*, 11 Kan. App. 2d 165, 167-68, 717 P.2d 522, *rev. denied*, 239 Kan. 693 (1986). This reasoning is sound, in that once an inmate owns certain property, the ownership of that property may not be taken from him or her without due process of law. However, there is a difference between the inmate's ownership rights in the property and the inmate's right to possess the property while in prison.

Under IMPP 11-101, when an inmate is reduced to Level I so that certain property which is in his or her possession may no longer be possessed by the inmate in prison, the property is not taken from his or her ownership. Instead, if this reduction to Level I is the first for the inmate, the property is stored at the institution until the inmate has either regained a level or failed to advance. If the inmate does regain a level, the inmate receives the property back. Otherwise, in every other case where the

reduction to Level I is not the first such reduction for the inmate, the property must leave the institution. However, this does not deny the inmate ownership of the property. Instead, the inmate has the choice of having the item mailed to an address of the inmate's choosing at the inmate's expense or with the approval of the warden at the expense of the facility, donating the item to charity, having the property picked up by an authorized person, or having the property delivered to a local address by the facility upon the approval of the warden.

Courts have held that where an inmate has been allowed to send property the inmate owns but is not allowed to possess in prison from the institution to an address of his or her own choosing, the inmate has not been deprived of the property so as to implicate the due process clause. See *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991); *Pryor-El v. Kelly*, 892 F. Supp. 261, 271 (D.D.C. 1995). Thus, although the petitioner was not allowed possession of the property in the case at hand, he did not lose ownership of the property, and therefore there was no taking sufficient to implicate due process.

Next, this court must address whether the restrictions imposed by IMPP 11-101 infringed upon the protected liberty interest of the petitioner. The first question in this analysis is whether the petitioner had a liberty interest in being allowed to possess certain property or enjoy certain activities and status available to him at Level III but denied at Level I. In *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), the United States Supreme Court held that while states may under certain circumstances create liberty interests, these interests will be generally limited to freedom from restraint which imposes an atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life. See *Murphy v. Nelson*, 260 Kan. 589, 600-01, 921 P.2d 1225 (1996).

The restrictions imposed at Level I do not impose an atypical or significant hardship on the petitioner in relation to the ordinary incidents of prison life. While the petitioner is denied the use of certain personal electronic equipment, this does not impose a significant hardship. Nor do the restrictions on purchases at the canteen or the types of purchases and personal property allowed constitute an atypical hardship. While Level I has a restriction on visitation, the United States Supreme Court has held that the denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence. See *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). Also, while Level I imposes some incentive pay restrictions, it has been held that an inmate does not have a constitutionally protected interest in employment. See *Templeman v. Gunter*, 16 F.3d 367, 370 (10th Cir. 1994). It is true that the test for whether a restriction is a significant hardship is not whether such restriction would violate due process on its own. See *Sandin*, 515 U.S. at 486. However, neither the restrictions on visitation nor incentive pay constitute a significant or an atypical hardship on an inmate which would not have been contemplated in his or her original sentence.

As a result, the application of IMPP 11-101 to the petitioner does not violate process.

Affirmed.

McFARLAND, C.J., dissenting.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 78,722

MICHAEL A. BANKES,
Appellant,

v.

CHARLES SIMMONS, et al.,
Appellees.

SYLLABUS BY THE COURT

1.

Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to ordinary rules of civil procedure. To avoid summary dismissal of a K.S.A. 60-1501 petition, allegations must be made of shocking and intolerable conduct or continuing mistreatment of a constitutional stature.

2.

The Fifth Amendment to the United States Constitution not only permits a person to refuse to testify against himself or herself at a criminal trial in which he or she is the petitioner, but also gives the person the privilege not to answer official questions in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate that person in future criminal proceedings.

3.

A witness protected by the privilege against self-incrimination may rightfully refuse to answer questions that would incriminate the witness unless and until he or she is protected at least against the use of his or her compelled answers and evidence derived therefrom in

any subsequent criminal case in which he or she is a defendant. Absent such protection, if the witness is nevertheless compelled to answer, the witness' answers are inadmissible against him or her in a later criminal prosecution.

Appeal from Reno district court; WILLIAM F. LYLE, JR., judge. Opinion filed June 5, 1998. Affirmed in part and reversed in part.

Michael K. Lehr, of Wichita, argued the cause and was on the brief, for appellant.

Timothy G. Madden, Chief Legal Counsel, Kansas Department of Corrections, argued the cause and was on the brief, for appellees.

The opinion of the court was delivered by

ABBOTT, J.: This is a habeas corpus action brought by Michael A. Bankes, a prisoner in the Hutchinson Correctional Facility (HCF). Bankes was convicted of indecent liberties with a child and sentenced to 4 to 15 years in prison in 1990. Some time after his sentencing, Bankes' unit team at the HCF recommended that he participate in the Sexual Abuse Treatment Program (SATP). In order to be admitted into SATP, Bankes was required to admit guilt for the crime of which he was convicted. This admission of guilt, along with any other information which Bankes conveyed to SATP counselors, could be turned over to authorities and used against Bankes in future proceedings. Due to this required admission of guilt, Bankes refused to participate in SATP. As a result of

his refusal to participate in SATP, Bankes' privilege incentive level was reduced from a level 2 to a level 1, pursuant to the Kansas Department of Corrections Internal Management Policies and Procedures (IMPP) Rule 11-101 (1998). Because of this reduction in his privilege incentive level, Bankes lost his personal TV and certain canteen privileges. Moreover, for each program review period in which Bankes refused to participate in the recommended SATP, he did not receive any good time credits pursuant to K.A.R. 44-6-134. This denial of good time credits resulted in an extension of Bankes' parole eligibility date and his conditional release date. Both IMPP 11-101 and K.A.R. 44-6-124 were amended to create this outcome after Bankes had been sentenced and served part of his sentence. Based on these consequences for his refusal to participate in SATP, Bankes filed a petition for habeas corpus in Reno County District Court, alleging that K.A.R. 44-6-124 violated his privilege not to incriminate himself and constituted an ex post facto law. The Reno County District Court dismissed Bankes' habeas corpus petition for failure to state a claim. Bankes appealed this ruling to the Court of Appeals. The case was transferred to this court pursuant to K.S.A. 20-3018(c).

Bankes' 4- to 15-year sentence did not include any order for Bankes to participate in any kind of psychological or psychiatric treatment for sexual offenders. The Kansas Department of Corrections (KDOC) placed Bankes in the Hutchinson Correctional Facility (HCF). At the time of his placement with the HCF, Bankes was not ordered to participate in any kind of psychological or psychiatric counseling for sexual offenders.

Further, at the time Bankes was sentenced to prison, KDOC had set out regulations in K.A.R. 44-5-104 and K.A.R. 44-5-105. K.A.R. 44-5-105 required that all inmates incarcerated in a KDOC facility be subject to a program plan conducted by a unit team within 1 month of an inmate's admission into prison. The plan could assign an inmate to participate in a certain program, but "the inmate [could] not be penalized for refusal to participate in a formal program plan." K.A.R. 44-5-104 classified the security level of the inmate. The inmate's security level determined his supervision requirements and his allowable privileges and freedoms. The factors necessary to determine an inmate's security level, pursuant to K.A.R. 44-5-104, and the supervision and privileges associated with each level were set out in the Secretary of Corrections' Internal Management Policies and Procedures manual (IMPP).

On February 9, 1993, and July 11, 1994, Bankes' program plan was reviewed by his unit team. These reviews did not order Bankes to attend a program for sexual offenders, and it classified Bankes as a medium security inmate pursuant to K.A.R. 44-5-104.

Good time credits are applied to an inmate's minimum sentence to determine his or her parole eligibility date and are applied to the inmate's maximum sentence to determine his conditional release date. K.A.R. 44-6-101(g), (m); K.A.R. 44-6-108. Upon reaching the conditional release date, an inmate is entitled to be released. See K.S.A. 22-3718; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29, 735 P.2d 222 (1987).

K.A.R. 44-6-108(c), which was in effect when Bankes committed his crime, stated, in pertinent part, that "[t]o establish the conditional release date, good time credits, not forfeited, *shall be presumed earned* and shall be applied to the maximum sentence term when first computed." (Emphasis added.) Thus, it was presumed for the purpose of conditional release that the inmate earned all available good time credits, and his or her conditional release date was predicated on that presumption. For parole eligibility, on the other hand, no such presumption applied, and the credits were tallied as earned to establish parole eligibility. See K.A.R. 44-6-108(b) (1989).

K.A.R. 44-6-124 (1989) provided guidelines for awarding good time credits *for parole eligibility*. No guidelines for the award of good time credits for conditional release were necessary, as 100% was presumed. The regulation stated:

> "(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.
>
> "(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.
>
> "(3) Inmates with no class I, II, or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.
>
> "(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

> "(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate." K.A.R. 44-6-124(a) (1989).

The regulation went on to further provide that the unit team had the discretion to refuse to award all or part of *the portion of credits for which it had discretion* based on an inmate's refusal to participate in recommended programs. K.A.R. 44-6-124(b) (1989).

K.A.R. 44-6-125(b) provided for the forfeiture of those good time credits "earned" for parole eligibility as well as those used to "create the conditional release date." It stated:

> "Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date." K.A.R. 44-6-125(b)(1989).

Thus, for purposes of parole eligibility, an inmate under the system as it existed at the time of Bankes' conviction was forced to earn his or her good time credits toward parole eligibility, while good time credits for a conditional release date were awarded at the outset. For the purposes of earning parole eligibility, an inmate with no class I offenses during the review period would receive at

least 50% of the good time credits for that period. An inmate with no class I, II, III, or IV offenses was guaranteed to receive at least 80% of the allocated good time credits. The balance of the credits were discretionary and could be awarded or not awarded for failure to participate in a program.

In January 1995, KDOC amended K.A.R. 44-6-124 to its present form. In pertinent part, it provided that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail." K.A.R. 44-6-124(g)(6). K.A.R. 44-6-142 was also amended and now provides that, rather than all available good time credits being presumed earned for purposes of conditional release, such credits were now subject to being earned as the sentence progressed, in the same manner as used for the calculation of parole eligibility.

In addition to these regulatory amendments, the Secretary of Corrections also revised the Department's internal management policies and procedures. Under IMPP 11-101, KDOC defined a new privilege incentives level system, the factors necessary to move up or down an incentive level, and the supervision and privileges associated with each level. This revised IMPP 11-101 is called the "Level System," and it created a system of incentives and privileges to encourage inmates to participate in programs. Under the level system, there are three levels at which an inmate can be classified. Under level 1,

inmates can watch the general TV and spend $20 per payroll period at the canteen. Under level 2, an inmate can have a personal TV, and the inmate can spend $80 per payroll period at the canteen. Obviously, the higher the level at which an inmate is classified, the more privileges and liberties the inmate receives. Under IMPP 11-101, if an inmate is assigned to participate in a certain program and the inmate refuses, then the inmate can be moved down an incentive level and lose the privileges associated with the higher level.

In 1995, Bankes participated in a 120-day program plan review by his unit team. He was assigned to participate in SATP. Bankes refused to voluntarily sign the program review or to participate in SATP. Pursuant to K.A.R. 44-6-124, 100% of Bankes' good time credits for this review period were withheld due to his refusal to participate in the assigned program.

At his next program review, the unit team again suggested that Bankes participate in SATP. Bankes continued to refuse to participate in such treatment. Pursuant to K.A.R. 44-6-124, 100% of Bankes' good time credits were again withheld due to his refusal to participate in SATP. Eventually, Bankes was reclassified, under IMPP 11-101, from a level 2 of privileges and incentives to a level 1, due to his refusal to participate in SATP, and Bankes lost the privileges associated with a level 2.

One of the main reasons Bankes refused to participate in SATP is that SATP requires each offender to "accept responsibility for the offense in which he was involved." In order to voluntarily be admitted into SATP, the program requires that the offender admit guilt to the

crime of which he or she was convicted. As the SATP admission document states:

> "This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Hutchinson Correctional Facility, which includes an admission of Guilt for my sex crime. I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt. This document will serve as my official Admission of Guilt to the following: [space provided for the inmate to write in the crime to which they are admitting guilt]."

Bankes objected to this admission of guilt requirement and refused to participate in SATP because of this requirement. At trial, Bankes denied that he committed the crime. Bankes continues to deny that he committed the crime and is currently pursuing an appeal of his conviction in federal court. According to Bankes, confessing guilt for the purpose of admission into SATP would jeopardize his appeal and subject him to perjury charges based on his testimony at trial.

In addition to requiring an admission of guilt for the crime for which the inmate is convicted, SATP also requires a participant to sign releases allowing the disclosure of confidential information gained by the SATP staff to KDOC personnel, the Kansas Parole Board, and HCF-SATP coordinator and staff.

Further, SATP requires participants to submit to polygraph testing as a part of the "treatment process." An unwillingness to participate in the polygraph testing as a

part of the treatment is considered a violation of the program agreement and can result in the termination of SATP treatment. Prior to taking a polygraph test, the SATP participant must provide an admission of guilt in his or her own words, an autobiography, a complete sexual history, and a complete confidential polygraph questionnaire. The polygraph results are only to be used for therapeutic purposes and are not to be used to determine guilt or innocence.

Finally, SATP requires participants to submit to a plethysmograph examination to evaluate the inmate's sexual arousal intensity and interests. Although the plethysmograph testing is voluntary, if the inmate should refuse to complete the evaluation or fail to cooperate with the evaluation, it will be noted and reported to the SATP treatment team and may constitute grounds for termination from the program.

In 1994, the Kansas Legislature enacted K.S.A. 59-29a01 *et seq.*, the Kansas Commitment of Sexually Violent Predators Act. Under this Act, if KDOC has information about an inmate convicted of a sexually violent offense which indicates that the inmate has a mental abnormality or personality disorder and meets the criteria for a sexually violent predator, then KDOC must give written notice of this information to the Attorney General before the inmate is released from prison so that the Attorney General can evaluate whether the inmate is a sexually violent predator and, if so, pursue commitment proceedings. KDOC is required to turn over this information even if it was gained through SATP. K.S.A.1997 Supp. 59-29a16; K.S.A.1997 Supp. 59-29a03.

The effect of the amendments to IMPP 11-101 and K.A.R. 44-6-124 on Bankes has been substantial. Prior to his refusal to participate in SATP, Bankes was assigned to a level 2 incentive level. Under this level, he was allowed his own personal TV and was allowed to spend $80 per pay period at the canteen. However, once Bankes refused to participate in SATP, his incentive level was reduced from a level 2 to a level 1 pursuant to IMPP 11-101. This reduction in incentive level resulted in Bankes losing access to his own personal TV and only being allowed to spend $20 per pay period at the canteen. Further, the amendments to K.A.R. 44-6-124 have affected both Bankes' parole eligibility date and his conditional release date. Prior to the 1993 amendment, his conditional release date was fixed by the presumption that all available good time credits were earned. Thereafter, that date could only be changed if he lost credits for committing offenses. However, under the 1993 amendment, Bankes became subject to a mandatory loss of 100% of his good time credits for failing to participate in a program. Thus, if he failed to participate, he would stop earning good time credits, and for every good time credit he failed to earn, his conditional release date would be extended. Thus, Bankes is now forced to earn good time credits toward conditional release, whereas under the prior regulations, he could only lose them for his improper behavior. He is also forced to earn good time credits toward parole eligibility, whereas previously he was guaranteed at least a percentage (80%) of available credits should he not have any Class I, II, III, or IV offenses.

The withholding of Bankes' earned good time credits lengthens his sentence for each plan review period he

continues to refuse to participate in SATP. Thus far, KDOC's action has lengthened his parole eligible date from November 26, 1994, as of February 9, 1993, to at least November 8, 1998, as of June 21, 1996, assuming he earns all his future good time credits by participation in SATP. His conditional release date has been lengthened from November 11, 2009, at the time of his incarceration, to at least May 5, 2011, as of November 5, 1996, assuming he earns all future good time credits. Bankes' release date, without receiving any future good time credits due to his continued refusal to participate in SATP, is July 21, 2024. This increase in jail time results from his refusal to participate in SATP, which requires him to not only admit to the crime he was convicted of, but to admit to other possible violations of the law by providing a complete sexual history to his SATP therapists. Should Bankes make these admissions, they can be released to law enforcement agencies without any guarantee that they will not be used against Bankes in any future criminal proceeding.

On December 26, 1996, Bankes filed this habeas corpus action in the District Court of Reno County against his unit team members, the HCF warden, and the Secretary of KDOC. In this action, Bankes claims that KDOC's requirement that he admit guilt for the crime of which he was convicted and participate in SATP violates his privilege not to incriminate himself as embodied in the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. Further, Bankes asserts that K.A.R. 44-6-124, which mandates KDOC to withhold his good time credits for refusing to participate in SATP, constitutes an ex post facto law by

increasing the punishment for a crime for which he had already been convicted. The District Court of Reno County dismissed Bankes' habeas corpus petition for failure to state a claim for which relief could be granted. Bankes appealed.

I. FIFTH AMENDMENT

> "Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to ordinary rules of civil procedure. To avoid summary dismissal of a K.S.A. 60-1501 petition, allegations must be made of shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Swisher v. Hamilton*, 12 Kan. App. 2d 183, Syl. ¶ 1, 740 P.2d 95 (1987), *rev. denied*, 242 Kan. 905 (1987).

The question of whether K.A.R. 44-6-124 violates Bankes' privilege not to incriminate himself or whether it is an ex post facto law is a question of law. The district court found there was no merit to this question and dismissed Bankes' habeas corpus petition for failure to state a claim. However, "this court's review of conclusions of law is unlimited." *Gillespie v. Seymour*, 250 Kan. 123, 129, 823 P.2d 782 (1991). Thus, the district court's conclusions are not binding on this court.

The Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights provide identical language that "[n]o person 'shall be compelled in any criminal case to be a witness against himself.' " The Kansas Supreme Court has ruled that the provisions of § 10 of the Kansas Constitution Bill of

Rights grant no greater protection against self-incrimination than does the Fifth Amendment to the United States Constitution. The purpose of the constitutional provisions, both state and federal, is to prohibit the compelling of self-incriminating testimonial or communicative acts from a party or a witness.

The Fifth Amendment not only permits a person to refuse to testify against himself at a criminal trial in which he is the petitioner, but also "privileges him not to answer official questions in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984), *reh. denied*, 466 U.S. 945 (1984); *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973). In all such proceedings:

> "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution." *Lefkowitz*, 414 U.S. at 78; see *Minnesota v. Murphy*, 465 U.S. at 426.

In *Allen v. Illinois*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986), the defendant challenged the Illinois State Sexually Dangerous Persons Proceedings Act. The defendant was charged with committing the crimes of unlawful restraint and deviant sexual assault. The State of Illinois filed a petition to have the defendant declared

a sexually dangerous person under an Illinois involuntary commitment procedure. Two psychiatrists testified at the commitment trial and gave an opinion as to the defendant's sexual dangerousness. Based in part on this testimony, the trial court committed the defendant as a sexually dangerous person. The defendant appealed his commitment to the United States Supreme Court. The Court held that the Illinois proceeding for involuntary commitment of a sexually dangerous person was a civil proceeding, as opposed to a proceeding of a "criminal" nature. Therefore, it concluded, the defendant's Fifth Amendment privilege against self-incrimination did not apply to him during such proceedings; thus, his Fifth Amendment privilege was not violated. However, in upholding the statute, the United States Supreme Court specifically noted that the Illinois Supreme Court had ruled that a person the State attempts to commit under the Act *is protected from the use of his or her compelled* answers in a psychiatric evaluation *in any subsequent criminal case,* as opposed to civil, in which he is the defendant. 478 U.S. at 368.

In Kansas, as in Illinois, commitment as a sexually violent predator is a civil proceeding, not a criminal proceeding. Since the Fifth Amendment does not apply in civil settings, the petitioner's compelled information required by SATP *can* be used against him in a civil commitment proceeding as a sexually violent predator. The *Allen* case does not allow the use of compelled information in future criminal cases – other sex crimes, perjury, etc. – but it does allow use of the compelled information in future civil cases, such as a commitment for a sexually violent predator.

In view of our ruling this day in *Stansbury v. Hannigan*, 265 Kan. ___, ___ P.2d ___ (1998), that the 1993 amendment to K.A.R. 44-6-124(g)(6) violated the Ex Post Facto Clause to the United States Constitution, we follow that decision. Later in this case, we find that many of the defendant's arguments concerning the Fifth Amendment are moot.

The United States Supreme Court has held that the Sexual Predator Act, allowing a person's confinement for treatment as a violent sexual offender, is civil in nature; thus, the Fifth Amendment to the United States Constitution does not apply. We see no valid reason to interpret § 10 of the Kansas Constitution Bill of Rights any differently. This, however, does not end our inquiry. The question remains as to information the defendant must furnish which subsequently can be used against him in a criminal proceeding. The State of Kansas must either give the defendant immunity from prosecution, or be subject to the well-recognized policies behind the privilege of self-incrimination and the legitimate need of governments to protect its children. Thus, if the State coerces a defendant into furnishing possible incriminating testimony by giving a prisoner no choice but to furnish incriminating information or serve a longer sentence for failure to do so, the State may not use that information or its fruits in subsequent criminal proceedings. See *Lefkowitz v. Turley*, 414 U.S. 70; *Allen v. Illinois*, 478 U.S. 364. We again note that the coerced information can be used in a civil proceeding, subject to the rules of evidence.

The housing assignment given to an inmate, his or her custody classification, granting of parole, spending

limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP. See *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir. 1996); *Lile v. Simmons*, 23 Kan. App. 2d 1, 929 P.2d 171 (1996); *Gilmore v. McKune*, 22 Kan. App. 2d 167, 915 P.2d 779 (1995); *Davis v. Finney*, 21 Kan. App. 2d 547, 902 P.2d 498 (1995).

In *State v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991), the question, similar to the one in the case at hand, was whether an inmate could be compelled, as a prerequisite to admission in a sexual therapy program, to admit guilt, where completion of such a program was required in order to allow him to keep his suspended sentence. 249 Mont. at 83. The Montana Supreme Court found that compelling the inmate to do so would cause a Fifth Amendment violation, *absent any grant of immunity for the statements*. 249 Mont. at 91. In so finding, the Montana Supreme Court reasoned:

> "Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in [*Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966)], for opportunities to challenge that conviction. For example, the defendant still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant

> could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt under such circumstances would be highly suspect. In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only as to the crime for which he has been convicted, but also to the crime of perjury. He testified in his own defense during his trial and denied committing the offense with which he was charged." 249 Mont. at 90-91.

Upon analyzing questions in conjunction with an inmate's probation, the United States Supreme Court noted in *Minnesota v. Murphy*:

> "Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, *as long as it recognizes the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination*. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake'. [Citations omitted.]" 465 U.S. at 435 n. 7.

Thus, respondents, in administering their Sexual Abuse Treatment Program, can insist that the petitioner admit responsibility, so long as his or her admission is not used against the petitioner in later *criminal* proceedings.

This is not a terribly satisfactory outcome. Bankes stands convicted of the offense, but maintains his innocence. He would consequently be forced to admit guilt which he does not acknowledge in order to participate in SATP and to keep his level 2 privileges. Whether Bankes and society will benefit from Bankes' treatment under those circumstances is not for the court to decide in this case. However, this situation does not appear to rise to the level of a Fifth Amendment violation; thus, this issue fails.

II. EX POST FACTO

Bankes argues that K.A.R. 44-6-124 constitutes an ex post facto law. According to Bankes, this regulation imposes an additional punishment on him after he had already been sentenced for the crimes of which he was convicted.

This issue has been decided on this day in *Stansbury*, 265 Kan. ___. To the reasoning in that case, we would add that trial judges are aware of conditional release dates and how they are computed. When the defendant was sentenced, most trial judges would have considered the maximum time the defendant would have to serve in setting the sentence.

For the reasons set forth in *Stansbury*, the application of K.A.R. 44-6-124 by KDOC to Bankes, due to his refusal to participate in SATP, violates the ban on ex post facto laws contained in the United States Constitution. Thus, as to the ex post facto issue only, the trial court's dismissal of Bankes' habeas corpus petition for failure to state a claim is reversed.

MCFARLAND, C.J., concurring and dissenting: I dissent from the majority opinion's determination that K.A.R. 44-6-124 constitutes an ex post facto law in reliance upon *Stansbury v. Hannigan*, No. 79,384, this day decided. I concur with the balance of the majority opinion.

LOCKETT, J., concurring and dissenting: I dissent from the majority's determination that withholding good time credits from a person who claims to be innocent and will not acknowledge guilt in order to participate in sexual abuse treatment program does not rise to the level of a Fifth Amendment violation. The majority requires an individual who may or may not be innocent to serve a longer sentence than those who admit guilt. Punishing Bankes for refusing to admit guilt is not violative of Bankes' constitutional rights under the Fifth Amendment, it is violative of Bankes' constitutional equal protection and due process rights under the Fourteenth Amendment.

I concur with the balance of the majority opinion.

ALLEGRUCCI, J., joins in the concurring and dissenting opinion of Lockett, J.

APPENDIX B

SUPREME COURT ORDER

DISTRICT CASE NO. 9607HC75

IN THE SUPREME COURT

OF THE STATE OF KANSAS

PRO SE

RAYMOND STANSBURY,
APPELLEE, CROSS-APPELLANT,

V NO. 97-79384-AS

ROBERT D. HANNIGAN, ET AL.,
APPELLANTS, CROSS-APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING AND MODIFICATION BY ROBERT D. HANNIGAN, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/08/98.

CAROL G. GREEN
CLERK

SUPREME COURT ORDER

DISTRICT CASE NO. 96C483

IN THE SUPREME COURT

OF THE STATE OF KANSAS

MICHAEL A. BANKES,
APPELLANT,

V NO. 97-78722-AS

CHARLES SIMMONS, ET AL.,
APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING AND MODIFICATION BY CHARLES SIMMONS, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/08/98.

CAROL G. GREEN
CLERK

APPENDIX C

SUPREME COURT ORDER

DISTRICT CASE NO. 9607HC75

IN THE SUPREME COURT

OF THE STATE OF KANSAS

PRO SE

RAYMOND STANSBURY,
APPELLEE, CROSS-APPELLANT,

V NO. 97-79384-AS

ROBERT D. HANNIGAN, ET AL.,
APPELLANTS, CROSS-APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TO THE UNITED STATES SUPREME COURT BY APPELLANT, ROBERT HANNIGAN, ET AL. DENIED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK

SUPREME COURT ORDER

DISTRICT CASE NO. 96C483

IN THE SUPREME COURT

OF THE STATE OF KANSAS

MICHAEL A. BANKES,
APPELLANT,

V NO. 97-78722-AS

CHARLES SIMMONS, ET AL.,
APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TO THE UNITED STATES SUPREME COURT BY APPELLEE, CHARLES SIMMONS, ET AL. DENIED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK

(2) (2)

FILED
OCT 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 98-366 & 98-367

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

DAVID R. McKUNE,
Petitioner,

v.

MARK L. STELTZLEN,
Respondent.

On Writs of Certiorari To The
Supreme Court Of The State Of Kansas

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA IN SUPPORT OF PETITIONERS

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
JON C. WALDEN
MICHELE M. SCHOEPPE
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

30 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

DANIEL E. LUNGREN
Attorney General
State of California

GALE A. NORTON
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MARGERY S. BRONSTER
Attorney General
State of Hawaii

JAMES E. RYAN
Attorney General
State of Illinois

JEFFREY D. MODISETT
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

SCOTT HARSHBARGER
Attorney Geneal
Commonwealth of Massachusetts

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

MICHAEL C. MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

TOM UDALL
Attorney General
State of New Mexico

DENNIS C. VACCO
Attorney General
State of New York

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JEFFREY B. PINE
Attorney General
State of Rhode Island

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

WILLIAM H. SORRELL
Attorney General
State of Vermont

DARRELL V. McGRAW, JR.
Attorney General
State of West Virginia

WILLIAM U. HILL
Attorney General
State of Wyoming

LIST OF PARTIES

The 36 *amici* states support the Petitioners in two related cases before this Court; *McKune v. Steltzlen*, Case No. 98-366 and *Hannigan, et al v. Stansbury, et al*, Case No.98-367.

The Petitioners in *McKune* are:

David McKune
Charles Simmons

The Respondent in *McKune* is:

Mark Steltzlen

The Petitioners in *Hannigan* are:

Robert Hannigan
David McKune
William Cummings
Anthony McElroy
Jamie Lanza
Mr. Wilson
Mr. Taylor
Mr. Robinson
Mr. Stokes
Mr. Ron Hicks
The Kansas Department of Corrections

The Respondents in *Hannigan* are:

Raymond Stansbury
Michael Banks

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI* INTEREST 1

REASONS FOR GRANTING THE WRIT 2

I. The Court Should Grant The Writ To Resolve A Growing Split Of Authority Regarding Application Of The *Ex Post Facto* Clause To Ministerial Prison Regulations 3

II. The Lower-Court Decision Implicates A Matter Of Grave Importance To The States 5

III. The Lower Court Erred 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Bailey v. Gardebring, 940 F.2d 1150
(8th Cir.), *cert. denied* (1991) 5
Bailey v. Noot,
503 U.S. 952 (1992) 5
California Dep't of Corrections v. Morales,
514 U.S. 499 (1995) 3,11
Collins v. Youngblood,
497 U.S. 37 (1990) 10
Department of Revenue of Montana v. Kurth Ranch,
511 U.S. 767 (1995) 11
Dominique v. Weld,
73 F.3d 1156 (1st Cir. 1996) 5
Francis v. Fox,
838 F.2d 1147 (11th Cir. 1988) 5
Hudson v. United States,
522 U.S. _ (1997) 11
Kansas v. Hendricks,
521 U.S. 346 (1997) 11
Lindsey v. Washington,
301 U.S. 397 (1937) 10
Lynce v. Mathis,
519 U.S. 433 (1997) 10
McGinnis v. Royster,
410 U.S. 263 (1973) 9
Miller v. Florida,
482 U.S. 423 (1987) 10
Preiser v. Rodriguez,
411 U.S. 475 (1973) 6,9
Sandin v. Connor,
515 U.S. 472 (1995) 2

Turner v. Safley,
482 U.S. 78 (1987) 6
United States v. Ellen,
961 F.2d 462 (4th Cir.), *cert. denied*,
506 U.S. 875 (1992) 5
Washington v. Harper,
494 U.S. 210 (1990) 6
Weaver v. Graham,
450 U.S. 24 (1981) 10

Constitutional and Statutory Provisions **Page**

K.A.R. 44-6-124(g) 3
K.S.A. 22-3725(d) 3,4

Miscellaneous **Page**

A. Beck, *Growth, Change and Stability in the U.S. Prison Population, 1980-1995* 8
Census of State and Federal Correctional Facilities,
Bureau of Justice Statistics Bulletin
(Aug. 1997) 7
Corrections Management Quarterly,
1, Table 5 (1997) 8
L. Greenfeld, A. Beck, and D. Gilliard;
Prisons: Population Trends and Key Issues for Management, 21 Criminal
Justice Review 4 (1996) 7
C. Heard, *Forecasting Models for a Changing Inmate Population: Implications for Public Policy*,
18 Criminal Justice Review 1 (Spring 1993) 8
C. Hill, *Population Projections*, Corrections
Compendium, Vol. 23, No. 5 (May 1998) 7

H.I.V. in Prisons and Jails,
Bureau of Justice Statistics (Aug. 1997) 7
C. Huff and M. Meyer, *Managing Prison Gangs and Other Security Threat Groups*,
1(4) Corrections Management Quarterly 10 (1997) 7
Inmate Privileges, Corrections Compendium,
Vol. 23, No. 7 (July 1998) 9
Prisoners in 1997, Bureau of Justice Statistics Bulletin (Aug. 1998) 6,7
R. Wilkinson, *The Future of Adult Corrections*,
1(1) Corrections Management Quarterly 57 (1997) 7

STATEMENT OF *AMICI* INTEREST

The State of Ohio and 35 other *amici* States join together in supporting the petitions for a writ of certiorari filed by the State of Kansas. At issue among other things is whether the *ex post facto* prohibition against retroactive punishments bars prison administrators from requiring certain inmates to participate in a remedial program -- here, a sexual abuse treatment program -- as a condition for continuing to earn future good-time credits. In holding that the clause prohibits States from requiring inmates to participate in such programs, the *amici* States respectfully submit that the lower court committed a reversible -- and highly consequential error.

The issue matters to the amici States for several reasons. First, the lower court's expansive construction of the *ex post facto* clause undermines one of the essential goals of prison administration -- rehabilitation. Whether in the area of sexual-abuse crimes or in other areas of criminology, an overriding objective of corrections work is to equip convicts to make a healthy, productive, safe and in the end permanent return to society. An interpretation of the *ex post facto* clause that prevents prison officials from fully using such treatment programs for *all* of their inmates, however, threatens to sidetrack if not affirmatively deter the achievement of each of these goals.

Second, the interpretation of the *ex post facto* clause embraced by the Kansas Supreme Court markedly contracts the necessary administrative flexibility needed to run a State prison. Prison officials with custody over an inmate serving a 20-year sentence are bound to see a host of new medical and sociological theories regarding prison administration over the course of that inmate's sentence. No doubt these developments do not give prison wardens carte blanche to impose new punishments during the course of the sentence. But surely these developments allow administrators to institute progressive treatment programs that account for these changes in

penological thinking. Again, so long as the primary thrust of the new programs is remedial rather than punitive, the *amici* States respectfully submit that these rehabilitation requirements are no business of the *ex post facto* clause.

Third, many of the *amici* States have good-time credit regulations similar to those of Kansas. Above all else, States use good-time credits to measure eligibility for early release and early consideration for parole. But, as with other remedial tools, prison administrators need flexibility to adjust those regulations to keep pace with new theories regarding rehabilitation and with fresh concerns about the safety of releasing an individual.

Even from the perspective of prisoners (also citizens of the States), it is not clear that the analysis adopted by the Kansas Supreme Court will in fact advance the liberty interests of present and future inmates. Such rigid interpretations of the *ex post facto* clause permit regulatory discretion only in the direction of rules leading to an early release. Yet few prison wardens or corrections officials will be willing to experiment with progressive early-release programs under such a one-way ratchet. At the end of the day, the lower-court decision thus "discourages" the "desirable development" of enacting laws to govern these issues and of developing new ways to rehabilitate prisoners. *Sandin v. Connor*, 515 U.S. 472, 482 (1995). For these reasons and those developed below, we submit this brief *amici curiae* for the Court's consideration.

REASONS FOR GRANTING THE WRIT

All three traditional reasons for granting the writ support the Kansas petitions here. The lower-court decision deepens a conflict of authority regarding the application of the *ex post facto* clause to discretionary prison regulations. The decision implicates essential federal questions affecting the prison-

administration interests of the sovereign States. And it fails correctly to resolve these important issues.

I. The Court Should Grant The Writ To Resolve A Growing Split Of Authority Regarding Application Of The *Ex Post Facto* Clause To Ministerial Prison Regulations.

By statute Kansas provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). In implementing the statute, the State has adopted several different sets of administrative regulations. The most recent one, and the one under attack here, requires inmates to "participate in assigned programs" -- in this instance, a rehabilitation program for those who have been convicted of sexual-abuse crimes -- in order to earn future good-time credits towards parole eligibility or early release. K.A.R. 44-6-124(g) (1993). No one disputes that a prior set of administrative regulations did not require participation in such remedial programs as a condition of earning good-time credits.

One question that arises under these circumstances is whether the *ex post facto* clause even applies to such inherently changeable ministerial rules. In providing that "[n]o State shall . . . pass any . . . *ex post facto* Law," Art. I, sec. 10, the clause prohibits only laws that "retroactively [1] alter the definition of crimes or [2] increase the punishment for criminal acts." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 505 (1995). In construing the clause, the Court has never applied the provision to procedural or remedial changes in the law. Nor, to the *amici*'s knowledge, has the Court ever applied the clause to administrative regulations, or for that matter even suggested that the clause applies in this executive (as opposed to legislative) setting.

The Court's two-century silence on the application of the clause to administrative regulations, in our considered judgment, is not surprising. A prohibition against "*ex post facto* laws" is a prohibition against legislative legerdemain. It does not limit executive-branch decisions about when to prosecute, when to investigate, when to plea bargain. And it does not limit judicial-branch decisions about what the law means. So long as the legislature does not retroactively change the definition of crime or change the rules of punishment, it does not enact an *ex post facto* law. For like reasons, so long as the ministerial authority the legislature delegates to administrative agencies comports with the bar against vague laws, with the limitations of due process and with the prohibitions against double jeopardy, its actions withstand constitutional scrutiny.

Moreover, when measured against the traditional *ex post facto* yardsticks -- notice, reasonable expectations, fairness -- a focus on the underlying enactments of the legislature in no way diminishes the clause's force. Consider again the pertinent language of the Kansas law: "Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." K.S.A. 22-3725(d). Nothing Kansas did wavered from its steadfast position that good-time credits would be earned. And no prisoner in light of this statute had any tenable basis for assuming that the administrative rules regarding *how* good-time credits were earned would otherwise remain constant. Still less would a prisoner serving a lengthy sentence have any such expectation. Otherwise, why would the legislature delegate ministerial authority to implement regulations? The very purpose of allowing corrections officials (rather than the legislature) to set this policy is because these kinds of issues lend themselves to on-the-scene adjustments, which again are as apt to benefit inmates as frustrate them. True, this delegation of agency authority does not permit a regulation that itself imposes punishment, a development that would either implicate double

jeopardy or due process. But so long as the regulations fit within an appropriate delegation of ministerial authority, they do not violate *ex post facto*.

Even if the *amici* States are wrong on this point (which, we respectfully submit, they are not), that does not diminish the force of the petition. Quite to the contrary: In view of the Court's silence on this issue, the lower courts have long struggled to resolve it, with some courts adopting the position embraced by the Kansas Supreme Court and others adopting the position Kansas and the *amici* States have proposed. As Kansas points out in its petitions, several federal courts of appeals have held that administrative regulations do not violate *ex post facto*. *See, e.g., United States v. Ellen*, 961 F.2d 462, 465-66 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992); *Bailey v. Gardebring*, 940 F.2d 1150, 1155-57 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 503 U.S. 952 (1992); *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir. 1988). Nor has this conflict of authority gone unnoticed or (as this case confirms) been non-recurring. *See, e.g., Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of certiorari on the issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n.10 (1st Cir. 1996).

In the end, the conflict of authority regarding the application of the *ex post facto* clause to administrative regulations supports the writ. On this basis alone, the writ should be granted.

II. The Lower-Court Decision Implicates A Matter Of Grave Importance To The States.

As this Court has long recognized, prison management represents a core sovereign function of the States. It "is difficult to imagine an activity in which a State has a stronger interest, or

one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

Recognizing the integral nature of prison management to the States, the Court has been careful to reconcile the constitutional rights of prisoners with the flexibility prison administrators need to run their corrections systems. For this reason, in all constitutional cases, not just First Amendment cases, *see Turner v. Safley*, 482 U.S. 78 (1987) the Court has adopted a lower standard of review regarding constitutional claims by inmates. The decision to do so, the Court has reminded litigants, is

> based upon the need to reconcile our long-standing adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment. We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.

Washington v. Harper, 494 U.S. 210, 223-224 (1990).

These considerations -- particularly the need to have flexibility in rehabilitating and securing prisoners -- have particular force here. Prison populations are expanding at unprecedented rates, having increased by more than 111 percent over the last six years. *Prisoners in 1997*, Bureau of Justice

Statistics Bulletin (Aug. 1998) at 4. Current statistics show that approximately 1100 new inmates are added to the nation's prisons each week, enough to fill almost two average-size prisons. *Id.* at 1, L. Greenfeld, A. Beck, and D. Gilliard; *Prisons: Population Trends and Key Issues for Management*, 21 Criminal Justice Review 4, 5 (1996). State prisons not surprisingly are operating at an average of 129% of capacity with a recent survey revealing that 39 states consider their overcrowding problems to be "serious," "very serious," or "critical." *Prisoners in 1997, supra* at 4; C. Hill, *Population Projections*, Corrections Compendium, Vol. 23, No. 5 (May 1998) at 15-17.

In addition to the growth in prison populations, States have had to address rapid changes in the composition and background of their inmates. There have been record increases in the number of violent offenders and prisoners affiliated with gangs, each presenting unique management challenges to corrections officials. *Prisoners in 1997, supra* at 11 (noting that violent offenders were responsible for 50% of the recent increase in overall prison population.); A. Beck, *supra* at 6, Table 7; C. Huff and M. Meyer, *Managing Prison Gangs and Other Security Threat Groups*, 1(4) Corrections Management Quarterly 10, 11 (1997). Growing numbers of prisoners, the statistics show, tend to commit new offenses when given access to supervised release. Greenfeld, Beck, and Gilliard, *supra* at 12; Beck, *supra* at 10-11. These trends are expected to continue and intensify. R. Wilkinson, *The Future of Adult Corrections*, 1(1) Corrections Management Quarterly 57 (1997); A. Beck, *supra* at 13. In recent years, prison wardens also have witnessed an unprecedented influx of female inmates and HIV-positive inmates, each requiring system-wide changes to prison management. *H.I.V. in Prisons and Jails*, Bureau of Justice Statistics (Aug. 1997); *Census of State and Federal Correctional Facilities*, Bureau of Justice Statistics Bulletin (Aug. 1997) at 1; Greenfeld, Beck, and Gilliard, *supra* at 18.

An increasing number of young inmates has created additional pressures of their own. A. Beck, *Growth, Change and Stability in the U.S. Prison Population, 1980-1995*, 1(2) Corrections Management Quarterly, 1, 4, 5, Table 5 (1997); C. Heard, *Forecasting Models for a Changing Inmate Population: Implications for Public Policy*, 18 Criminal Justice Review 1,2 (Spring 1993).

In view of these rapid changes in prison populations and in view of the penological challenges that come with them, it is particularly important that prison officials have flexibility to adjust their operating procedures to account for these developments. Yet rather than account for these challenges to prison management, the lower-court decision has exacerbated them.

At a specific level, the decision precludes frequently-needed refinement of one of the tested incentives for good behavior and rehabilitation -- good-time credits. Such programs, it has been recognized, provide essential motivation for good conduct and for prisoners to rehabilitate themselves in preparation for release:

> The actual allowance of 'good time' is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.
>
> The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and 'good time' granted as an incentive.

McGinnis v. Royster, 410 U.S. 263, 273 n.20 (1973). The decision below, however, prevents inherently-necessary modifications to good-time credits and thus interferes with an aspect of penal administration that this Court has recognized is best left to the discretion of corrections officials. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-492 (1973).

At a more general level, the lower-court decision could have a potentially broader, more disruptive impact. Given the Kansas Supreme Court's emphasis on the "disadvantageous" effect of new regulations, the decision could well ossify operating procedures in other vital areas. In response to the ever-shifting dynamics of prison management, 80% of the states have altered their internal operating procedures since 1995 in ways that are arguably "disadvantageous" to prisoners. *Inmate Privileges*, Corrections Compendium, Vol. 23, No. 7 (July 1998) at 6. Those changes deal with such diverse matters as health care administration, property and entertainment privileges, smoking, occupational training and computer use, and DNA testing for criminal investigatory purposes. *Id.* at 7-8. In view of the arguably "disadvantageous" nature of those changes, they all could well be endangered by the lower-court decision. In each of these respects, the lower-court decision affects matters of significant federal import. This factor, too, independently supports the writ.

III. The Lower Court Erred.

Even aside from the conflict of authority heightened by the lower-court decision and the importance of the issues presented, the flaws in the decision by the Kansas Supreme Court by themselves support the writ. One analytical flaw in particular overrides all others -- the court's mistaken assumption that a sexual-abuse treatment program constitutes "punishment" under the United States Constitution.

After properly acknowledging that the *ex post facto* clause covers only "additional *punishment*" (Pet. 14a) (emphasis added), *see Collins v. Youngblood*, 497 U.S. 37, 41 n.2 (1990) ("the Court has consistently adhered to the view . . . that the *Ex Post Facto* Clause applies only to penal statutes"), the Kansas Supreme Court proceeded to characterize Kansas's rehabilitation program as punitive in nature. That is flatly wrong.

To start with, no *ex post facto* decision from this Court supports such a wide-ranging construction of punishment. All of the relevant cases invalidating changes in State law plainly contemplate new *punitive* measures. *See, e.g., Lynce v. Mathis*, 519 U.S. 433 (1997) (change in statute required reincarceration of inmates that had been released); *Miller v. Florida*, 482 U.S. 423 (1987) (change in statute required longer prison sentence); *Weaver v. Graham*, 450 U.S. 24 (1981) (change in statute required longer incarceration); *Lindsey v. Washington*, 301 U.S. 397 (1937) (change in statute required longer incarceration). The sensible requirement that individuals convicted of sexual-abuse crimes participate in treatment programs, whether in existence at the time the crime was committed or not, simply does not fall within the factual or legal parameters of these cases. The reason is straightforward: The decision to require inmates to participate in these new rehabilitation programs is self-evidently remedial in nature. A contrary decision would dramatically hamstring not just these progressive forms of treatment but would have the perverse effect of limiting many other similar programs as well. For example, if a prison may not pass a regulation requiring convicted sex offenders to participate in treatment programs, it is not clear that it could require inmates who are high school dropouts to take vocational or other educational courses. Surely the Constitution is not an adversary of such well-meaning programs.

Recent precedent concerning the double jeopardy clause is to the same effect. There, as here, State laws implicate the provision only if they are punitive, as opposed to remedial, in nature. *See Hudson v. United States*, 522 U.S. __, 118 S. Ct. 488, 493-95 (1997). There, as here, a program designed to treat, as opposed to incarcerate, a sexual offender does not violate the Constitution. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). And there, as here, "whether a sanction constitutes punishment is not determined from the defendant's perspective" because otherwise virtually all government measures would be deemed punitive. *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1995).

Under the Kansas Supreme Court's decision, however, there are now two types of "punishment" under the United States Constitution -- one for double jeopardy purposes and one for *ex post facto* purposes. That cannot be the law. Surely the same limitation on punishments carries the same meaning throughout the individual-liberty guarantees of the Constitution. Thus, as the Court already indicated in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the operative question is not the inmate-centric view adopted by the Kansas Supreme Court -- whether a change in law "disadvantages" the inmate. It is whether the law "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506 n.3. And, as the Court's holdings all make clear, the *ex post facto* clause (like the Constitution's other limits on punishment) does not limit a State corrections agency from imposing new remedial requirements on its inmates -- so long as they are neither punitive in design nor effect.

These considerations also support the writ. The Kansas Supreme Court's decision goes well beyond the punitive focus of this Court's *ex post facto* precedents and in the process creates a schism in the definition of "punishment" for *ex post facto* and for double jeopardy purposes. The Court should grant

review to correct this critical error and to prevent it from being exported to other States.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
JON C. WALDEN
MICHELE M. SCHOEPPE
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for *Amici* States

October, 1998

ORIGINAL

No. 98-367

Supreme Court, U.S.
FILED
NOV 9 1998
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached brief in opposition without prepayment of costs and to proceed *in forma pauperis*.

[X] Respondent has peviously been granted leave to proceed *in forma pauperis* in the following court(s):

The Leavenworth County District Court
The Supreme Court of the State of Kansas

[ ] Respondent has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Raymond F. Stansbury
(Signature)

43 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Raymond F. Stansbury, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. My employment was terminated in November of 1990; at that time, my gross monthly income was $3,000.00

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No X

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No X

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No X

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: November 9, 1998.

Raymond F. Stansbury
(Signature)

No. 98-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND F. STANSBURY, PRO SE
Ellsworth Correctional Facility
P.O. Box 107
Ellsworth, KS 67439-0107

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

QUESTIONS PRESENTED vi

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED ... 1

I. STATEMENT OF THE CASE 9

II. REASONS FOR DENYING THE PETITION 14

A. The September 13, 1993 Version of K.A.R. 44-6-124 Is Inherently More Punitive Than The Old Version, Withholding Good Time for Program Refusal Notwithstanding 14

B. The Provisions of K.A.R. 44-6-145, 44-6-107(a), (b); And 44-5-105(c)(1) Are Dispositive Of The Petitioners' Application For A Writ of Certiorari 16

C. Upon Examination, Many Of The Cases Cited By The Petitioners As Being Contrary To The Kansas Supreme Court's Decisions Ironically Offer Support, While Others Are Distinguishable Or Irrelevant 17

D. Virtually All Of The Petitioners' Administrative Regulations Create Constitutionally Enforceable Liberty Interests 27

E. The Circumstances In *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960 (1981), Were Mild Compared To What The Petitioners Have Imposed In The Instant Case 29

F. Because Their Interminable Punitive Measures For Refusing To Officially Assume Guilt Suppress The State Statutory And Federal Constitutional Rights Of Those Who Wish To Challenge Their Convictions, The Petitioners' Application For Certiorari Should Be Summarily Denied (U.S. Const. Art. 1, § 9, cl. 2; K.S.A. 60-1507; 28 U.S.C. § 2254) 32

1. The Petitioners' Coercive Tactics Are Designed To Override The Fifth Amendment Privilege Against Compelled Self-Incrimination 32

2. Denying Parole Eligibility And Conditional Release To Only Certain Individuals Who Have Been Convicted Of An Alleged Sex-Related Offense Because They Refuse To Abdicate The Statutory And Constitutional Right To Seek Habeas Relief, While All Other Offenders Are Free To Challenge Their Convictions Unfettered, Violates The Precepts Of Due Process And Equal Protection Of The Law 36

III. CONCLUSION 38

TABLE OF AUTHORITIES

Cases:	Page(s)
Arnold v. Cody, 951 F.2d 280, 283 (10th Cir. 1991)	31
Baily v. Gardebring, 940 F.2d 1150 (8th Cir.1991)	27
Baxter v. Palmigiano, 425 U.S. 308, 96 S. Ct. 1551 (1976)	35
Beck v. Kansas Adult Authority, 735 P.2d 222, Syl. ¶ 18, 241 Kan. 13 (1987)	19
Board of Pardons v. Allen, 482 U.S. 369, 377-78, 107 S. Ct. 2415 (1987)	28
Bordenkircher v. Hayes, 434 U.S. 357, 363, 989 S. Ct. 663 (1978)	37
Bowen v. Johnston, 306 U.S. 199, 26, 49 S. Ct. 442 (1939)	36
California Dept. of Corrections v. Morales, 514 U.S. ___, 115 S. Ct. 1597 (1995)	18
Chaffin v. Stynchcombe, 412 U.S. 17, 32-33, no. 20, 93 S. Ct. 1977 (1973)	37
Chauvin v. Erickson, 998 F.2d 617 (8th Cir. 1993)	23
City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249 (1985)	37
Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2175 (1990)	22
Dobbert v. Florida, 432 U.S. 282, 298, 97 S. Ct. 2290 (1977)	20
Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996)	26
Ekstrand v. Oklahoma, 791 P.2d 92, 95 (Okla. Crim. App. 1990)	31
Estelle v. Smith, 451 U.S. 454, 462, 101 S. Ct. 1866 (1981)	35
Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993)	25, 26
Ex parte Hull, 312 U.S. 546, 549, 61 S. Ct. 640 (1941)	36
Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989)	25
Francis v. Fox, 838 F.2d 1147 (11th Cir. 1988)	27
Garner v. United States, 424 U.S. 648, 661, 96 S. Ct. 1178 (1976)	35
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12, 99 S. Ct. 2100 (1979)	28
In re Ramirez, 705 P.2d 897 (Cal. 1985)	23
Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan., 927 F.2d 1111, Syl. ¶ 7 (10th Cir. 1991)	38
Johnson v. Avery, 393 U.S. 483, 486, 89 S. Ct. 747 (1969)	36
Kansas v. Hendricks, 117 S. Ct. 2072, 2086 (1997)	26
Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 109 S. Ct. 1904 (1989)	28
Learner v. Gill, 751 F.2d 450, 454 (1st Cir. 1985)	20
Lynce v. Mathis, 519 U.S. ___, 117 S. Ct. 891 (1997)	21, 22, 32
McMorrow v. Little, 109 F.3d 432 (1997)	35
Minnesota v. Murphy, 465 U.S. 420, 444, 104 S. Ct. 1136 (1984)	35
Preiser v. Rodriguez, 411 U.S. 475, 484-85, 93 S. Ct. 1827 (1973)	37
Rodriguez v. United States Parole Com'n, 594 F.2d 170, 175 (7th Cir. 1979)	20
Spaulding v. Maynard, 527 F. Supp. 398, 399, Syl. ¶ 1 (D. Okla. 1981)	31
State v. Imlay, 813 P.2d 979 (Mont. 1991)	33
Taylor v. Best, 746 F.2d 220, 222 (4th Cir. 1984)	32
Thomas v. United States, 368 F.2d 941 (5th Cir. 1966)	33, 34
United States v. Conkins, 987 F.2d 564, 565, Syl. ¶ 6 (9th Cir. 1993)	37
United States v. Ellen, 961 F.2d 462, 465 (4th Cir. 1992)	17, 27
United States v. Goodwin, 457 U.S. 368, 372, 102 S. Ct. 2485 (1982)	37
Warden v. Marrero, 417 U.S. 653, 663, 94 S. Ct. 2532 (1974)	20

Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960 (1981) ..... passim
Wolf v. McDonnell, 418 U.S. 539, 555, 94 S. Ct. 2963 (1984) 27

Constitutional Provisions:

U.S. Const. Art. I. § 9, cl. 3; Art. I, § 10, cl. 1 1
U.S. Const. Amend. 14, § 1 1
U.S. Const. Art. I, § 9, cl. 2 ..... 1, 32
Kan. Const. Bill of Rights, § 8 1

Statutes:

K.S.A. 60-1507 ..... 32, 37
K.S.A. 22-3717 ..... 3, 17
K.S.A. 22-3718 ..... 3, 17
K.S.A. 22-3725 17
K.S.A. 75-5210 ..... 2, 3, 5, 6, 7, 8, 22
K.S.A. 75-5251 ..... 2, 3, 5, 7, 8, 22
K.A.R. 44-6-107(a), (b) 19
K.A.R. 44-6-145 ..... 3, 16, 19
K.A.R. 44-6-124 (May 1, 1984 amendment) ..... passim
K.A.R. 44-6-124 (September 13, 1993 amendment) ..... passim
K.A.R. 44-5-105(c)(1) 6, 20, 24
K.A.R. 45-4-6(c) 6
K.A.R. 44-6-108(b), (c) 16, 19
K.A.R. 44-6-101 7
K.A.R. 44-6-113 7
K.A.R. 44-6-142(a) (May 1, 1984 amendment) 7, 16
K.A.R. 44-6-125(b), (c) 7, 19
K.A.R. 44-6-142(a) (January 3, 1995 amendment) 8

QUESTIONS PRESENTED

1. If the Kansas Legislature has delegated to the DOC the authority to promulgate regulations instead of doing so itself (for the express purpose of implementing its statutes), are the resulting regulations extensions of the statutes, and are they subject to scrutiny under the Ex Post Facto Clause?

2. Can the petitioners legally and constitutionally ignore the directives of controlling administrative regulations that ordered them to compute the respondent's initial parole eligibility date and conditional release date using the regulations in effect on the date of his alleged crime?

3. Can the petitioners legally and constitutionally disregard the directive of an administrative regulations that ordered them not to penalize an inmate for refusing to participate in a program?

4. Is procedural due process violated when the petitioners willfully and wantonly refuse to follow their own administrative regulations?

5. Is it constitutionally permissible to permanently withhold years' worth of the respondent's earned good time credits and confiscate his personal property in response to his refusal to abdicate the statutory and constitutional right to collaterally challenge his conviction?

6. Are the principles of due process and equal protection violated when only certain individuals who have been convicted of an alleged sex-related offense are severely punished by retrospectively rescinding parole eligibility and conditional release for maintaining a trial plea of innocence, for refusing to succumb to the inexorable demands of prison officials for an official admission of guilt, and for seeking habeas relief, while all other types of offenders are free to contest their convictions without being punished and are accorded the full ambit of provisions for reduced imprisonment without submitting a confession?

7. Is a habeas corpus proceeding considered to be a "criminal case" for purposes of the Fifth Amendment privilege against compelled self incrimination?

8. Can the Kansas provisions for conditional release—which, pursuant to K.S.A. 22-3718, is "mandatory" once the maximum term of imprisonment, less good time credits, has been served—be constitutionally conditioned on obtaining a coerced admission of guilt?

9. Is the respondent (who ardently maintains that he is innocent and is currently seeking post conviction relief) under any legal or constitutional obligation to provide the petitioners with a coerced confession that could serve as the basis for lifelong confinement in the state's mental institution once the prison term has been served, and can the petitioners constitutionally revoke conditional release for the respondent's refusal to falsely admit to guilt?

10. Does an accused, even after conviction, have a constitutional right to maintain his innocence, or do the petitioners have the power to coerce (through severe, ongoing punitive measures) changes in the pleas of those who have exercised the right to trial by jury?

11. Can the petitioners constitutionally subject the respondent to only the punitive features of presumptive sentencing provisions enacted two years after his indeterminate sentence was imposed without converting his sentence to flat time?

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Ex Post Facto Clauses of the United States Constitution (Art. I, § 9, cl. 3; Art. I, § 10, cl. 1) provide that no state shall pass any ex post facto law.

Section 1 of the 14th Amendment to the United States Constitution states in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Suspension Clause of the United States Constitution (Art. I, § 9, cl. 2) provides that "The privilege of the Writ of Habeas Corpus shall not be suspended. . . ."

Section 8 of the Kansas Constitution Bill of Rights provides that "The right to the writ of habeas corpus shall not be suspended. . . ."

The state statute authorizing an inmate to apply for a writ of habeas corpus, Kansas Statute Annotated (K.S.A.) § 60-1507, provides in relevant part:

> *Motion attacking sentence*. A prisoner in custody under sentence of a court of general jurisdiction claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may at any time move the court which imposed the sentence to vacate, set aside or correct the sentence.

K.S.A. § 22-3717, the statute governing parole eligibility, provides in pertinent part:

> (a) [A]n inmate . . . shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.
>
> (n) An inmate shall be eligible for parole on the date provided by statute at the time the inmate committed the crime for which imprisoned unless subsequent amendment of the statute provides an earlier parole eligibility date.

K.S.A. § 22-3718 provides in part that an inmate is entitled to be released from prison once he has "served [his] maximum term or terms, less such work and good behavior credits as have been earned. . . ."

K.S.A. § 22-3725 simply creates a pool of good time credits for reducing the sentencing ranges of indeterminate sentence inmates but does not establish any criteria for determining how credits are earned (only pertinent to parole eligibility) or how many to award; K.A.R. 44-6-124 (set out further below) does both, thereby making it indispensable in the computation of initial parole eligibility and conditional release. Since it implements the statutes that provide for reduced imprisonment, it is a direct extension of them and is easily the most significant set of provisions to this case. Moreover, contrary to what the petitioners have stated in their application for certiorari, K.S.A. § 22-3725 is not the "controlling" statute of the particular version of K.A.R. 44-6-124 that applies to this case: ironically, K.S.A. 75-5251 (which addresses the government and discipline of correctional institutions) and K.S.A. 1983 Supp. 75-5210 (which addresses inmate programs and program agreements) are. In any event, § 22-3725 provides in pertinent part:

> (a) For the purpose of determining an inmate's eligibility for parole or conditional release, regardless of when the inmate was sentenced or committed the crime for which sentenced, good time credits shall be allocated as follows: [A lengthy table follows providing for awards of maximum good time credits in the amounts of one-half of the sentenced imposed for sentences of two years or greater.]
>
> (d) Good time credits shall be awarded on an earned basis pursuant to the rules and regulations adopted by the secretary of corrections.

K.A.R. 44-6-107, conveniently omitted from the petition for certiorari at issue, is a pivotal administrative regulation to the instant case because of the governing effect it exerts over which version of K.A.R. 44-6-124 must be used in computing initial parole eligibility and conditional release. As it appears below, 44-6-107 has been continuously in effect from 1984 to the present time, providing in pertinent part:

(a) The statutes constituting the substantive law in effect at the time the crime is committed shall apply to compute the sentence term and the release dates. No subsequent change in the statute constituting substantive law shall be applied if that law adversely affects the inmate. Changes in statute constituting substantive law which benefit the inmate may be applied to compute the inmate's sentence term and the release dates, but shall not be required to be applied except in the computation of parole eligibility. Parole eligibility shall be computed by applying the statute in effect at the time the inmate committed the crime for which imprisoned unless subsequent changes in the statute provide an earlier parole date. If the amendment would yield an earlier parole eligibility date, that amendment shall be applied. Statutes establishing the formula for computation of parole eligibility shall be considered substantive law and not procedural law.

(b) Any statute or regulation that has been repealed or revoked shall continue to apply to sentences of inmates when other statutes, regulations or the principles of constitutional law require its terms to be applied to that inmate. . . .

(Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210. (Emphasis added.)

K.A.R. 44-6-145 is another critical Article 6 regulation that was left out of the petition before this Court. It too has a definite bearing on which version of 44-6-124 applies to the case sub judice. Reinforcing the nondiscretionary provisions of 44-6-107 set out above, it has been continuously in force from 1984 to the present time, materially providing: "Incentive good time credits which were authorized and applied under previous policies and regulations shall continue to be credited to the inmate's sentence and applied to the record." (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210. (Emphasis added.)

Since parole eligibility and conditional release dates cannot be determined without using K.A.R. 44-6-124, it is implicit to such statutes as K.S.A. 22-3717 and 22-3718 and is an essential part of the "substantive law" providing for reductions in the sentencing ranges of prisoners. Even though the plain and unambiguous terms of K.A.R. 44-6-107 and 44-6-145 ordered the petitioners to compute the respondent's parole eligibility and conditional release dates using the law and associated regulations in effect on the date of his alleged crime, they applied the radically amended September

13, 1993 version of 44-6-124 in order to severely punish him for refusing to relinquish the statutory and constitutional right to seek habeas relief. The particular version of 44-6-124 that must be applied in the case at bar is the May 1, 1984 amendment, since it was in effect on September 9, 1990—the date of the respondent's alleged crime.

Placed side-by-side for ease of comparison, the May 1, 1984 version appears on the left, with the more onerous September 13, 1993 provisions (invalidated by the Kansas Supreme Court) appearing on the right. One point the reader should be aware of is that prior to the publication of the radically amended September 13 version in the Kansas Register on July 29, 1993, the term "withholding" and its variations were nonexistent in the Article 6 regulations governing good time; however, with the term's introduction on the aforementioned date (before then the only way good time credits could be lost was through "forfeiture" by the disciplinary board for having been found guilty of various infractions set out in the inmate rule book, among which program refusal still isn't listed), a second, and far more punitive, method for deferring parole eligibility and conditional release was created.

The relevant portions of each version of 44-6-124 provide:

For parole eligibility, award of good time credits shall be limited as follows:

(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.

(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.

(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.

(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate.

(b) Award at discretion of unit team and based on merit. The unit team shall refuse to award all or part of that portion of the credits over which they have discretion for poor behavior or work, for malingering in educational programs, or for other relevant reasons determined, explained and documented by the unit team. Inability to work or participate in programs due to legitimate health problems, or for other reasons beyond the inmate's control shall not be considered grounds, standing alone, for refusing to award good time credits. (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

(f) The following factors shall be considered in determining whether an inmate has earned good time credits:

(1) the inmate's performance in a work assignment;

(2) the inmate's performance in a program assignment;

(3) the inmate's maintenance of an appropriate personal and group living environment;

(4) the inmate's participation in release planning activities;

(5) the inmate's disciplinary record; and

(6) other factors related to the inmate's general adjustment, performance, behavior, attitude, and overall demonstration of individual responsibility and accountability.

(g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.

(1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.

(2) A guilty finding of a class II disciplinary offense shall result in the withholding of a minimum of 25% but not more than 50% of the good time credits available for that program classification review period.

(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period.

(6) A refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail. (Authorized by and implementing K.S.A. 1993 Supp. 22-3725.) (Emphasis added.)

K.A.R. 44-5-105(c)(1) is another material regulation to the instant case: one the petitioners found expedient to leave out of their application for certiorari for obvious reasons. Note that in addition to proscribing punitive measures for inmates who elect not to participate in programs, it is ironically authorized by, and implements, K.S.A. 75-5210—the statute that pertains to inmate programs and program agreements. It has been continuously in effect from 1984 to the present time, providing:

> (c)(1) Any inmate may elect not to participate in a formal program plan. In such an event, that inmate shall not be prohibited from participating in any programs as are available, but the inmate shall first obtain the recommendation and approval of the unit team. The unit team may recommend the inmate for parole eligibility based on the inmate's rehabilitation progress accomplished by the inmate's own initiative. The inmate shall not be penalized for refusal to participate in a formal program plan. The inmate shall nevertheless be subject to all the regulations of the secretary and the orders of the principal administrator, and shall be required to participate in any work assignments which are made by the unit team. (Authorized by K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 1983 Supp. 75-5210, 75-5220, 75-5229.) (Emphasis added.)

K.A.R. 45-4-6(c) was also annexed to the respondent's alleged crime, providing that "Inmates who are appealing their sentence or conviction shall not be adversely affected in the parole process or deliberations. The board may, however, continue the parole hearing for a reasonable time for the purpose of clarifying the status of the appeal to assure that the board is considering the applicant on the proper sentence." (Authorized by and implementing K.S.A. 1984 Supp. 22-3717.) (Emphasis added.)

The 1990 version of 44-6-108 reinforces the fact posited above that prior to the first appearance of the term "withholding" in the radically altered version of 44-6-124 in the Kansas Register on July 29, 1993, all good time credits not "forfeited" were presumed "earned" and applied to the sentence. 44-6-108 provides in relevant part:

> (b) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall be awarded to reduce the time required to be

served on the minimum term of those sentences as described in these regulations and applicable law.

(c) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed. (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

K.A.R. 44-6-101, a regulation defining various terms used in the Article 6 regulations, defines "[f]orfeiture of good time credits" as "the removal of the credits and consequent reinstatement of a term of actual imprisonment by the disciplinary board pursuant to K.A.R. articles 44-12 and 44-13 as published in the inmate rule book" and "[c]onditional release date" as "the maximum sentence ending date minus total authorized [by the legislature, not the DOC] good time credits not forfeited." Once again, none of the Article 6 regulations annexed to the respondent's alleged crime provided for "withholding" good time credits.

K.A.R. 44-6-113 provides:

In determining parole eligibility . . . good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit team, to have earned them. However, an auxiliary accounting record, separate from the official inmate record and for informational purposes only, may be used to show the maximum total authorized credits that the inmate may earn. This record may show the parole eligibility date which would occur if all good time credits were earned. (Emphasis added.)

In contrast to 44-6-113 quoted above, the 1990 version of K.A.R. 44-6-142(a) provides in pertinent part that "It shall be presumed, when computing the conditional release, that 100% of the available good time credits is earned and the good time credits shall be applied on a projected basis." (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.) (Emphasis added.)

The 1990 version of K.A.R. 44-6-125 also drew a distinction between the good time credits applied toward parole eligibility versus those credits presumptively awarded at the outset to establish

conditional release, by describing the former in terms of being earned, while the latter as simply those credits "used to create the conditional release date." Moreover, when the more burdensome and punishing version of 44-6-124 was introduced in 1993, "withholding" joined "forfeiture" as a second and far easier method of denying credits (no disciplinary hearing is required), and the unit team joined the disciplinary board or hearing officer as an additional individual vested with the power to deny them. The relevant portions of 44-6-125 provide:

> (b) Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date.
>
> (e) Forfeiture made by disciplinary process. Forfeiture of good time credits may be ordered by the disciplinary board or hearing officer as a penalty for the inmate's commission of certain offenses as set out in K.A.R. 44-12-1 *et seq.* and 44-13-1 *et seq.* (Authorized by K.S.A. 75-5251, K.S.A. 1983 Supp. 75-5210; implementing K.S.A. 22-3427, 75-5251, K.S.A. 1983 Supp. 21-4608, 22-3717, 75-5210.)

On January 3, 1995, the DOC radically changed the language of K.A.R. 44-6-142 pertaining to fixing conditional release dates. Prior to that time, standards for awarding good time toward conditional release were not provided in any of the Article 6 regulations because they weren't needed—all available credits were awarded from the outset for purposes of conditional release and could only be lost if forfeited. Instead of providing that 100% of the available good time credits applicable to the conditional release date shall be presumed earned and applied on a projected basis, the regulation now provides in relevant part:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date.

When all of the above regulations are read together, it becomes clear that (1) the Article 6 regulations to be applied to an inmate for the duration of his incarceration were those that were in

effect on the date of his alleged crime; (2) even if they were repealed or revoked, they were to continue being used in calculating reductions to his sentence; (3) prior to January 3, 1995, his conditional release date was initially set based on the presumption that all credits authorized by the legislature had been earned; (4) unlike the credits automatically awarded to establish the conditional release date, those credits for parole eligibility actually had to be earned pursuant to the appropriate version of K.A.R. 44-6-124; (5) he was not to be penalized for choosing not to participate in programs; and (6) all of the Article 6 regulations—via implementation—are intimately related to the statutes providing for reduced imprisonment.

I. STATEMENT OF THE CASE

Due to a questionable rape conviction in case no. 90-CR-2168, the respondent began serving an indeterminate sentence of 10 to 20 years on May 18, 1991, at the age of 39. Prior to the date of his alleged crime, September 9, 1990, he had never been arrested for criminal activity of any kind. He categorically pled "not guilty" at his trial and has ardently maintained his innocence ever since.

Having conducted a detailed psychological evaluation of the respondent and a thorough review of his alleged crime, the State Reception and Diagnostic Center (SRDC) psychologist assigned to his case explicitly told him that he would not be required to participate in the Sexual Abuse Treatment Program (SATP)—a stipulation that is clearly recorded in the KDOC program agreement he was urged to sign. She undoubtedly took the following facts into consideration in making her determination: (1) the prosecutrix admitted that she had engaged in unreported sexual activity with the accused before the date of the alleged rape; (2) she conceded that during a visit immediately preceding the incident in question, he had asked for her permission to bring a condom on his next visit (the day of the alleged rape) for the purpose of having intercourse with her; (3) on the day of the

reputed crime, the accused phoned first to ask if he could come over, and instead of leaving or calling the police, she chose to change into more presentable clothing and wait for his arrival; (4) there were no physical signs of force; (5) she admitted that she was never physically harmed and that no threats were ever made; (6) a thorough medical examination produced no evidence of injury; and (7) a police report disclosed that she had discovered before the filing of her complaint that the accused had asked her younger girlfriend for a date. All of the above points represent uncontested facts recorded in the respondent's trial record.

Well after he had begun to serve his sentence, the respondent's unit team counselor, an individual possessing no more than a high school education and completely untrained in making psychological or diagnostic assessments, arbitrarily decided to override the SRDC psychologist's program recommendations and amended his program agreement to reflect the addition of SATP. Because it would violate his religious beliefs and personal ethics to assume guilt for an alleged crime of which he was actually innocent, and because he was planning on pursuing post conviction relief, the respondent refused to sign the amended agreement. Moreover, in order to complete the DOC's mental health program, he was required to provide a detailed account of his reputed offense in the presence of his instructor and all the other members of his group, which he did with the utmost degree of honesty and sincerity. The facts surrounding his alleged crime were also thoroughly explored at his trial, and there is absolutely nothing he could divulge in SATP that hasn't been fully discussed in the past.

One of the first things demanded of SATP enrollees is an official, written admission of guilt. In fact, the formal admission is an integral part of the agreement inmates must sign in order to be accepted into the program. Inmates who sign the agreement are not provided with a copy, and they are not given a Miranda warning. The program administrator and staff categorically refuse to

consider vehement claims of innocence and questionable evidence or circumstances; they unwaveringly demand that all new participants proffer an admission of guilt, regardless of whether it results in a false statement manufactured under conditions of duress. Inmates are threatened that if they refuse to stipulate to guilt, they will be expelled from the program, all their good time credits will be withheld, and they will be placed on the level system (IMPP 11-101). The admissions of guilt and any other information obtained in the program are not privileged or confidential; they can, and are, used against individuals in subsequent legal proceedings, including those associated with the Sexual Predator Act.

Ironically, SATP has always been touted as a "voluntary program" by prison officials and the implementing staff. On April 18, 1995, Barbara Owens, the SATP coordinator at Lansing Correctional Facility (LCF), stated in writing that the program is voluntary, with no consequences imposed for refusals (see exhibit A). In fact, even Mr. McKune, LCF's warden, stated in an interrogatory pertaining to another suit that SATP participation is voluntary and not required by the KDOC (see exhibit B). However, such claims couldn't be further from the truth, as the following scheme of severe punitive measures for refusal attests:

1. Pursuant to IMPP 11-101, an intransigent inmate who refuses to acquiesce is immediately placed on level one, which results in the confiscation of his television, radio, headphones, and other personal property, all of which were sold to him at a substantial profit by the KDOC. And for those who continue to refuse, their personal property is peremptorily shipped out of the institution and never allowed back into the prison system.
2. Visitation by family members, friends, and relatives is severely restricted.
3. Library use, religious function attendance, and participation in arts and crafts and other activities are either rescinded entirely or severely restricted.

4. The inmate's access to his own money in his institutional account is severely restricted.

5. He is barred from buying books or subscribing to magazines.

6. He is arbitrarily given a higher custody classification and moved to the maximum security area of the prison.

7. His good time credits are permanently withheld at the rate of 100%.

8. Parole eligibility and conditional release are severely retarded or rescinded entirely.

Therefore, given the extreme nature of the consequences for refusal, SATP participation is, de facto, mandatory.

With the advent of presumptive sentencing in Kansas, DOC officials realized that individuals sentenced under the new law would be far more likely to refuse programs because of their fixed release dates. Accordingly, they chose to radically amend K.A.R. 44-6-124 in order to create a deterrent for refusals, since it literally controls the award of good time and is therefore pivotal in determining the ultimate length of time an individual is imprisoned. Even though the amended version was originally intended for presumptive sentence inmates—a contention strongly supported by the fact that it was published in the Kansas Register contiguously with K.A.R. 44-6-146 (identical to the new version of 44-6-124, but addressed to individuals sentenced under flat time) in the same month and year (July of 1993) the new sentencing guidelines became effective—prison officials couldn't resist applying its punitive features to inmates sentenced under the old, indeterminate system. However, its retrospective application to individuals sentenced under the old law makes it far more punishing to them as compared to those sentenced under the new, due to the major differences in the sentencing techniques and the amount of good time credits available to each group. (The respondent respectfully contends that if he is to be expected to bear the punitive features of the new law, he should be converted to flat time so he can experience its benefits as well.)

The provisions of 44-6-124 in effect before the September 13, 1993 amendment made it mandatory for an indeterminate sentence inmate who had not been found guilty of any disciplinary offenses during the 120 day review period to be awarded at least 80% of the good time credits (96 of the 120 available) for each review period he was found to be free of offenses. The award of the remaining 20% of the credits was subject to the discretion of the unit team counselor, based on factors other than disciplinary infractions. Prior to 44-6-124's amendment, there were no provisions in any of the Article 6 regulations that allowed for the withholding of credits for refusal to participate in a program; afterwards, prison officials assumed total discretionary control over all the credits, inmates were no longer automatically awarded good time for avoiding disciplinary violations, and pursuant to subsection (g)(6), program refusal became punishable by withholding the entire range of available credits.

Even though the petitioners were fully aware that the respondent had challenged his conviction in an application for habeas relief on November 19, 1996 (presently under consideration by the Kansas Court of Appeals), they continued to withhold the good time credits he had earned during each 120 day review period for refusing to proffer an official admission of guilt pursuant to the terms of SATP. By the time the state courts ruled auspiciously in the instant matter, the petitioners' refusal to abide by the directives of their own administrative regulations had resulted in the loss of 1,120 days' worth of the respondent's earned good time credits, a wrongful deferment of his initial eligibility for parole for one-and-a-half years, and a conditional release date that had been moved from its rightful place several years into the future. The respondent has been irreparably harmed by the severe postponement of his first parole hearing, as he can never regain the 18 month period it was deferred. Thus, each subsequent hearing will be held a year-and-a-half later than it should have been.

Because of the inexorable pressure applied by the petitioners' interminable penalties and the overt vindictiveness they have displayed against the respondent for having initiated litigation—he has no doubt that if he were ever to enroll in any version of the program conducted by DOC personnel, every effort would be made to gratuitously fill his file with unfavorable reports and assessments—he attempted to reach a compromise with them by offering to participate in a comparable program conducted by an outside agency, as long as he would not be-required to submit an admission of guilt. His offer wasn't made out of any culpability with respect to the purported crime, but out of a genuine willingness to cooperate and to learn. He also offered to take a plethysmographic examination, since it is the primary indicator SATP personnel consider in determining whether an individual has a tendency to reoffend. Not only would an outside program provider with no ties to the DOC be neutral and unbiased with respect to both parties, but the treatment provided would also be of a superior quality, conducted by specialists who are typically far better trained and educated for such a task. Both proposals were categorically rejected by DOC officials, which leads the respondent to believe what he has always suspected—that the prison program's putative goal of treatment or rehabilitation belies its true goal of finalizing convictions and generating additional evidence for civil commitment, even when it does not actually exist.

II. REASONS FOR DENYING THE PETITION

A. The September 13, 1993 Version Of K.A.R. 44-6-124 Is Inherently More Punitive Than The Old Version, Withholding Good Time For Program Refusal Notwithstanding.

Concerning page 7 of their application, the petitioners' portrayal of the May 1, 1984 version of 44-6-124 as a system of "minimum awards" and the supplanting September 13, 1993 version as

a system of "minimum withholding," implying that the new version is more lenient than the old, is false and designed to mislead this Court. As a matter of fact, it was common practice under the old version of the regulation for an inmate who had been found guilty of a class infraction not to lose any good time whatsoever.

Indeed, when the provisions of the old version of 44-6-124 are examined, it becomes readily apparent that an inmate could be found guilty of a class I offense—or any combination of class offenses I through IV during the review period for that matter—and still receive all of the available credits, because loss of good time wasn't mandated for a finding of guilt on a class offense under the old regulation. Subsection (a)(1), for example, simply made it mandatory for inmates with no class I offenses during the review period to be given a minimum of 50% of the credits; in actual practice under the old regulation, the unit team had the discretion to award all of the credits, and often did so, even though an inmate had been found guilty of a class I or II offense. In such instances, if the inmate were willing to plead guilty to the offense and forgo the disciplinary hearing, segregation time and/or monetary fines were often imposed in lieu of good time loss. If the petitioners attempt to deny these facts, the respondent can produce sworn affidavits from disciplinary coordinators and inmates alike to the contrary.

With the advent of the September 13, 1993 version, good time loss became mandatory for disciplinary infractions. A finding of guilt on a class I offense mandates that a minimum of 50% of the available credits be permanently withheld, but in actual practice under the new system, it is not uncommon for all of them to be withheld. A finding of guilt on a class II offense mandates the withholding of 25 to 50% of the credits, and a finding of guilt on a class III offense mandates the loss of 10 to 25% of the credits. But the most radical feature of the new regulation is that, for the first time, program refusal is punishable and results in the loss of 100% of the available credits.

Therefore, bearing the requirements of SATP in mind, it becomes obvious when the two versions of the regulation are compared that Kansas has gone (1) from a system where an inmate could still receive all of the available good time credits if he had been found guilty of a disciplinary offense to one where a finding of guilt mandates the loss of good time; (2) from a system where the unit team was forced to award at least 80% of the credits for an offense-free record to one where, for the same performance, he is mandated to withhold all of them in response to program refusal; (3) from a system where parole eligibility and conditional release could be reached in the normal course of time solely through good behavior to one where both are substantially deferred or rescinded altogether in response to refusal to participate in a voluntary program; (4) from a system where an inmate could exercise constitutionally and statutorily conferred rights without fear of losing his personal property to one where invoking those rights results in permanent property loss without due process; and (5) from a system where an inmate could collaterally attack his conviction and refuse to falsely incriminate himself without fear of reprisals to one where invoking those rights results in the loss of statutorily conferred opportunities for reduced imprisonment.

Another misleading representation appears on page 6 of the petitioners' application. The portrayal of the old version of K.A.R. 44-6-142 thereon as simply serving as a means to tentatively establish an inmate's conditional release date when he enters the prison system and nothing more can be quickly dispelled with K.A.R. 44-6-108(c), which states that "To establish the conditional release date, good time credits not forfeited shall be presumed earned and shall be applied to the maximum sentence term when first computed." In fact, under the good time regulations annexed to the respondent's alleged crime, all credits not "forfeited" were considered "earned" because as previously explained, provisions for "withholding" good time didn't exist: they didn't enter the Article 6 regulations until the new version of 44-6-124 was introduced in 1993.

B. The Provisions Of K.A.R. 44-6-145; 44-6-107(a), (b); And 44-5-105(c)(1) Are Dispositive Of The Petitioners' Application For A Writ of Certiorari.

The respondent respectfully contends that the triumvirate of pivotal regulations listed above are material to the disposition of the application before this Court. Striking a fatal blow to the petitioners' claims, K.A.R. 44-6-145 provides that "[i]ncentive good time credits which were authorized and applied under previous policies and regulations shall continue to be credited to the inmate's sentence and applied to the record," and 44-6-107(a) and (b) ordered the petitioners to compute the respondent's parole eligibility and release dates using the provisions in effect on the date of his alleged crime, even if they had been repealed or revoked. Moreover, the third member of the group, 44-5-105(c)(1), provides that an inmate "shall not be penalized" for choosing not to participate in programs. Even though all three regulations are still in effect, and even though the first two dictate which version of 44-6-124 must be applied in computing the aforementioned dates, all three have met with pretermission at the hands of the petitioners. The respondent contends that this group of regulations renders the petitioners' application gratuitous, a waste of this Court's precious time, and one that should be denied with celerity.

Additionally, it should be noted that unlike other states, Kansas chose to place the substantive provisions governing how good time credits are earned and awarded in administrative regulations rather than in statutes. In fact, contrary to the claim made on page 5 of the petitioners' application, a perusal of K.S.A. 22-3717, 22-3718, and 22-3725 will show that they provide no detail whatsoever of "how such credits are earned, awarded, forfeited, withheld, and accumulated": only the regulations provide such essential information. K.S.A. 22-3717 and 22-3718 make generalized statements about parole eligibility and conditional release, but neither provides any criteria for achieving them. Therefore, when the above-noted facts are taken into consideration, along with the fact that the

regulations at issue are direct extensions of the statutes they implement,[1] no weight should be accorded the claim that the statutes have remained unchanged.

C. Upon Examination, Many Of The Cases Cited By The Petitioners As Being Contrary To The Kansas Supreme Court's Decisions Ironically Offer Support, While Others Are Distinguishable Or Irrelevant.

In their application for certiorari, the petitioners relied heavily on the holdings in *California Dept. of Corrections v. Morales*, 514 U.S. ___, 115 S. Ct. 1597, 131 L.Ed.2d 588 (1995); however, they have distorted the facts of the instant case in an attempt to bring it under the control of *Morales* and have ignored the most critical points made by this Court in that case: (1) the amendment allowing for the decrease in the frequency of subsequent suitability hearings left unchanged the substantive formula for securing any reductions to the sentencing range (115 S. Ct., at 1602); and (2) the amendment had no effect on the standards for fixing a prisoner's "initial" date of parole eligibility (*id.*, at 1502 and 1504). The second point—one which was repeatedly stressed in this Court's opinion—was no doubt crucial to the determination that the level of punishment had not been increased. (The respondent interpreted those statements to mean that if the amendment had adversely affected the provisions for establishing initial parol eligibility or for securing reductions to the sentencing range, the outcome would have been different.) Moreover, this Court held that the amendment only applied to a class of prisoners (those convicted of more than one murder) whose likelihood for release on parole was remote, and simply extended the time between subsequent

---

[1] The respondent ironically relies on one of the petitioners' cases—*U.S. v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992)—for the proposition that the regulations at issue are extensions of the above-noted statutes and are subject to scrutiny under the Ex Post Facto Clause. On page 465, the Fourth Circuit Court of Appeals in *Ellen* appositely quoted a Seventh Circuit Court of Appeals' case by stating: " '[W]hen Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative regulation is an extension of the statute for purposes of the Clause.' "

hearings, provided the Board had made specific findings of unsuitability at the initial hearing. *Id.*, at 1603.

The case at bar is not one where changes have been made to parole guidelines; it is not one where the time between subsequent parole hearings has been increased; it is not one where the criteria for determining eligibility for work release have been changed; it is not one where the amendments pertain to the safety, order, or efficiency of the prison system; it is not one where a simple "refinement" has been made to the "definition of good behavior"; it is not one where the punishment for future disciplinary infractions has been slightly increased; and it is not one where the changes have no relationship to the alleged crime for which the respondent is imprisoned. Unlike the circumstances in *Morales*, the radically amended regulations in the instant case have had a profound effect on the standards for fixing the respondent's initial parole eligibility date and his conditional release date. Moreover, the fact that Morales pled "nolo contendere" notwithstanding, the amendment in his case did not conflict with the fundamental right to seek habeas relief as the amendments and the terms of SATP do in the immediate case.

As previously noted, K.A.R. 44-6-107(a), (b) and 44-6-145 ordered the petitioners to use the versions of 44-6-124, 44-6-108, and 44-6-142 in effect on the date of the respondent's alleged crime in computing his eligibility for parole and his conditional release date. Significantly, the sentence introducing the criteria for earning and awarding good time credits in the May 1, 1984 version of 44-6-124 set out above explicitly states that "For parole eligibility, award of good time shall be limited as follows," thus allowing no room for amendments or substitutions. And under the old version of 44-6-124, it was "mandatory" for the unit team counselor to award at least 80% of the available good time credits for each review period an inmate remained free of class offenses. K.A.R. 44-6-108(c) stated that in setting the conditional release date, all good time credits not "forfeited" were considered

"earned" and were to be applied to the maximum sentence term when first computed, and 44-6-142(a) directed that it was to be "presumed" in computing conditional release that 100% of the available credits were "earned" and that they were to be applied on a "projected basis." "Conditional release is mandatory, not discretionary, once the maximum term of imprisonment, less earned good time credits, has been served." *Beck v. Kansas Adult Authority*, 735 P.2d 222, Syl. ¶ 18, 241 Kan. 13 (1987).

With respect to indeterminate sentences before the amendments, the initial parole eligibility date was determined by adding the time served to the good time credits earned on a day-for-day basis, and when the total reached the inmate's minimum sentence, he became parole eligible. And as previously noted, the conditional release date was set from the outset by presuming that all available credits had been earned. Critical to the compution of both is K.A.R. 44-6-125(b), which provides that the only way either date can be adjusted to the inmate's detriment is through the "forfeiture" of credits. However, with the introduction of the radical amendments to 44-6-124 and 44-6-142, prison officials seized absolute discretionary control over all the credits; inmates were no longer automatically awarded good time for avoiding disciplinary infractions; they were no longer presumptively awarded a conditional release date from the outset; and for inmates like the respondent, who are unwilling to give up the statutory and the constitutional right to seek post conviction relief, the new amendments provide for the withdrawal of all statutorily conferred opportunities for reduced imprisonment that were annexed to the alleged crime. The amendments to 44-6-124 have also rendered the punishment prohibition of K.A.R. 44-5-105(c)(1) emasculate, even though the regulation has never been revoked. Moreover, pursuant to subsection (f)(6) of the new version of 44-6-124, prison officials can arbitrarily withhold all of the available good time credits for virtually any whim or reason that comes to mind, not just for program refusal.

Since the supplantation of the old forms of 44-6-124 and 44-6-142 with the radically amended ones resulted in the loss of 1,120 earned good time credits, the postponement of an initial parole hearing for one-and-a-half years, and a conditional release date that was virtually nonexistent, it cannot be said, as it was in *Morales*, that the amendments at issue have left the substantive formula for securing any reductions to the respondent's sentencing range unchanged.

Through the Ex Post Facto Clause, it was intended that legislative acts and amendments give fair warning of their effect. *Dobbert v. Florida*, 432 U.S. 282, 298, 53 L.Ed.2d 344, 97 S. Ct. 2290 (1977). And the federal courts have repeatedly held that provisions for initial parole eligibility are part of the law annexed to the crime for ex post facto purposes. See, e.g., *Warden v. Marrero*, 417 U.S. 653, 663, 94 S. Ct 2532, 2539, 41 L.Ed.2d 383 (1974); *Rodriguez v. United States Parole Com'n*, 594 F.2d 170, 175 (7th Cir. 1979); *Learner v. Gill*, 751 F.2d 450, 454 (1st Cir. 1985). The respondent in the instant case was never given any prior warning that he would be severely punished for his refusal to submit a false admission of guilt and for exercising the constitutionally and statutorily conferred right to seek habeas relief. In fact, his program agreement features the stipulation that he would not be required to participate in SATP. Had he known the petitioners would renege on their stipulation, eradicate all possibility for reduced imprisonment, and confiscate his personal property for his refusal to give up the aforementioned rights, he never would have signed the agreement.

The case at bar is further distinguishable from *Morales* in that the respondent has no prior record, and his alleged victim admitted that she was never threatened or physically harmed in any manner. But even without taking the distinctions between the two cases into consideration, the respondent asseverates that the intimations made by this Court that it would have been a different matter if the amended statute had disadvantageously changed the provisions for securing reductions

to the sentencing range render *Morales* a case that imparts validity and merit to the Kansas Supreme Court's opinion in the immediate case.

Contrary to the petitioners' claims, the instant case is similar in effect to *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 137 L.Ed.2d 63 (1997), where (for certain classes of inmates) a new Florida statute served to retroactively cancel release credits formerly awarded to alleviate prison overcrowding. In both cases, the new provisions allowed prison officials to reach back in time and take away what had already been awarded (in the case at bar, a mandatory conditional release based on the presumption that all credits not forfeited were earned) under the provisions in effect at the time of the offense for which imprisoned.

In regard to the petitioners' recurring argument that the regulations in question merely effectuate the controlling statute's directive that good time credits shall be awarded on an earned basis is fallacious because, as previously noted in the section of regulatory provisions relevant to this case, K.S.A. 22-3725 was never designated as the controlling statute over any of the regulations annexed to the respondent's reputed crime—surprisingly, K.S.A. 75-5210 (providing for inmate programs) and 75-5251 (providing for discipline in correctional institutions) control over all of them! Moreover, the respondent asseverates that he did earn the credits in dispute by satisfying the criteria set out in the old versions of K.A.R. 44-6-124(a)(4) and 44-6-108(c), both of which were "adopted by the secretary of corrections" and in effect for over two years after his sentence was imposed. But in spite of the foregoing points, the petitioners should take note of the fact that in *Lynce*, the Court scolded the parties for placing undue emphasis on the lawmakers' subjective "intent" rather than focusing on the "effect" of the disputed changes. (For the reasons noted above, the respondent submits that the holdings in *Lynce* lend authority and support to the Kansas Appellate Courts' opinions in the Ex Post Facto Cases presently before this Court.)

In *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2175, 111 L.Ed.2d 30 (1990), the prisoner applied for a writ of habeas corpus, contending that the Ex Post Facto Clause was violated by the retroactive application of a new statute allowing for a Texas appellate court to reform his unauthorized sentence (imposing both life imprisonment and a $10,000 fine) without the necessity of remanding for a retrial. This Court held, inter alia, that since the statute in question did not make more burdensome the punishment for a crime after its commission—indeed, as the District Court noted, the punishment was actually decreased by the withdrawal of the fine—its application to the petitioner was not prohibited by the Clause. 110 S. Ct., at 2724. For all the reasons previously noted in this brief, the respondent respectfully contends that unlike the circumstances in *Youngblood*, the punishment has been retrospectively increased in the present case, and that the petitioners' claims to the contrary are preposterous.

Chauvin v. Erickson, 998 F.2d 617 (8th Cir. 1993), was an ill-suited case selection for the propositions posed on pages 14 and 18 of the petitioners' application, as one of its key holdings actually supports their adversary's cause. In similar fashion to the instant case, the statutory provisions in force at the time of the petitioner's crime provided that he receive good time credit against his sentence according to a formula based on the number of days he did not violate any prison disciplinary rule. *Id.*, at 618. A year later, Minnesota added the requirement that prisoners perform work assignments when available to earn good time credit under the formula for that day. *Ibid.* Claiming that the new requirement violated the Ex Post Facto Clause by burdening his opportunity to earn good time under the formula, the prisoner filed a civil rights action.

In dispensing with his claims, the Eighth Circuit Court of Appeals noted that (1) before the work requirement was enacted, prison regulations required prisoners to perform work assignments, and refusing to work or disobeying a direct order to work was a disciplinary infraction; (2) a prisoner

who incurred a disciplinary infraction for refusing to work or disobeying a direct order could not earn good time credit for that day; and (3) since the new statutory work requirement did not change the conditions for earning good time credit, it did not operate to the petitioner's detriment. *Id.*, at 619. In other words, if the new requirement had detrimentally changed the conditions for earning good time credits (as the regulatory amendments have obviously done in the case sub judice), it would have been a violation of the Clause.

Claiming the circumstances to be "essentially identical" to those in the instant case, the petitioners cite *In re Ramirez*, 705 P.2d 897 (Cal. 1985), as an example where the Clause was held not to be violated. Notwithstanding the respondent's sincere belief that *Ramirez* was wrongfully decided—in fact, the case features an outstanding dissenting opinion to that effect—there are substantial distinctions between the two cases.

In its analysis of the case, the California Supreme Court readily conceded that the new sentence reduction credits system disadvantaged the petitioner (*id.*, at 900), but held that since the forfeiture of 48 days' credits was for a disciplinary offense (altering the paperwork relating to a television set) committed while in prison and had no connection to the original crime that resulted in Ramirez's imprisonment, it was not retrospective (*id.*, at 901). The foregoing claim cannot be made in the immediate case, as it is irrefragable that the withholding of years' worth of the respondent's earned good time is intimately related to the alleged crime that imprisoned him.

Fraudently altering a television's paperwork would have also, no doubt, been a punishable infraction under the old California system; the petitioners have readily admitted in their application that program refusal was not punishable [it still isn't according to K.A.R. 44-5-105(c)(1)] prior to the amendments in the case at bar. Nor can it be said that the new system in *Ramirez* would conflict with California's statutory and constitutional provisions for prisoners seeking habeas relief. And

finally, *Ramirez* is obviously not a case where the standards for fixing initial parole eligibility or a mandatory release date were altered to his disadvantage, or one where prison officials reached back in time to withdraw a statutory release date that had already been awarded.

With respect to the dissenting opinion in *Ramirez*, the sagacious justice noted, relying in part on *Weaver v. Graham*, that (1) regarding the issue of retrospectivity, the question should be recast as asking whether the new statute applies to prisoners convicted of acts committed before its effective date (*id.*, at 902); (2) sanctions are one determinant of a petitioner's total prison term, and the term is effectively altered once that determinant has been changed (*id.*, at 903); (3) contrary to the majority's reasoning, the holdings in *Greenfield v. Scafati* definitely apply (*ibid.*); and (4) despite the claims of inconsistent disciplinary rules and immunity from punishment for some prisoners, a uniform disciplinary system can be maintained by prison officials (*ibid.*).

Denying good time credits for refusing to submit a blood sample to prison officials for a DNA information bank, the point of controversy in *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), is obviously a disparate situation from the one in the present case as well, where the credits were withheld in response to a refusal to sacrifice the constitutional right to seek habeas relief with a coerced admission of guilt. And unlike the petitioners in *Ewell*, the respondent freely submitted a blood sample for the same purposes when asked to do so by Kansas prison officials. Although the Fourth Circuit Court of Appeals approved the denial of the credits for the aforementioned reason, it issued other holdings during the course of its analysis that are far more pertinent to the immediate case.

First, the Court significantly held that an inmate does have the right, as of the time of his sentence, to expect the good conduct credits then defined for good behavior. *Id.*, at 486. Second, and more importantly, the Court noted that it unequivocally held a retrospective Virginia statute

denying an inmate who had escaped from custody parole eligibility on his original offense to violate the Ex Post Facto Clause,[2] and then drew the distinction that *unlike the penal nature of provisions governing parole eligibility*, the DNA provision is administrative in nature. *Id.*, at 487. Third, it noted that an inmate's credits are restored if he subsequently decides to submit a blood sample. *Id.*, at 485. Fourth, the Court conceded that changes to good time regulations can violate the Due Process Clause by depriving inmates of liberty interests, but seemed to imply that the prior Virginia good time provisions did not limit official discretion by using language of an "unmistakably mandatory character," i.e., "shall," "will," or "must." *Id.*, at 488. And last of all, the Court stressed that inmates who had lost good time for refusing to submit a blood sample were accorded the full ambit of due process, i.e., the right to a hearing, the right to an advisor, the right to call witnesses, etc. *Ibid.*

Unlike the circumstances in *Ewell*, credits are never restored in the instant case, and no due process attends their taking. Moreover, a review of the regulations before this Court shows, incontrovertibly, that virtually all of them are written in such a manner as to create definite liberty interests in good time, parole eligibility, and conditional release. Furthermore, the petitioners in the current case are attempting to do what the Court of Appeals deprecated in the example case it cited in *Ewell*, i.e., to retrospectively rescind the provisions for parole eligibility and conditional release annexed to the imprisoning offense. For all the reasons stated above, the respondent submits that *Ewell* can be viewed as another case that supports his contentions and the Kansas Supreme Court's opinions.

In *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996), the prisoner simply contested the retroactive application of revised criteria for work release eligibility on due process and ex post facto

---

[2] See *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989).

grounds. Because the involved regulations and the work release agreement contained no explicitly mandatory language (unlike the regulations in the present case) and preserved the broad decision making authority of state officials, the First Circuit Court of Appeals found no liberty interest violations and denied relief on the due process claims. *Id.*, at 1161. The petitioner's ex post facto claim met with a similar fate, because the Court found that the regulatory changes affected neither the length of the petitioner's sentence nor his parole options. *Id.*, at 1163. Because the instant regulations abound in explicitly mandatory language, and because their amendments have adversely affected the respondent's parole options, he finds support in the holdings of *Dominique*.

The petitioners also cited a number of cases as acknowledging a "split of authority" over whether prison regulations and parole guidelines are "laws" for ex post facto purposes, and other cases as standing for the proposition that since they are not laws, they are not cognizable under the Clause, including such cases as *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997); *Morales*, supra; and *Youngblood*, supra. Although the respondent could be mistaken, he does not believe the statements made in the foregoing precedents were intended to exclude from ex post facto scrutiny regulations of the type that are the focal point of the immediate case. Moreover, because the highly emphasized "split of authority" pertains to "parole guidelines" and not to substantive regulations that set out standards for determining initial parole eligibility and mandatory release dates, the petitioners' reliance on the cases cited is malapropos.

Using *Francis v. Fox*, 838 F.2d 1147 (11th Cir. 1988), another case involving altered criteria for work release eligibility challenged on due process and ex post facto grounds, to reinforce the aforementioned contention, the Eleventh Circuit Court of Appeals held in part that (1) parole guidelines are not "laws" within the meaning of the Ex Post Facto Clause (*id.*, at 1150); (2) they are stated policy rules showing how agency discretion is likely to be exercised (*ibid.*); and (3) a change

in guidelines *does not affect the point at which a prisoner becomes eligible for parole* or his mandatory release date (*ibid.*). Although the factual circumstances in *Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), and *U.S. v. Ellen*, 961 F.2d 462 (4th Cir. 1992) are different, the respective Courts issued holdings of a similar nature—holdings that lead the respondent to the ineluctable conclusion that the regulations in the case sub judice are subject to ex post facto scrutiny.

D. Virtually All Of The Petitioners' Administrative Regulations Create Constitutionally Enforceable Liberty Interests.

In *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S. Ct. 2963, 2974, 41 L.Ed.2d 935 (1984), it was established that in comparison to an ordinary citizen, a prisoner assumes diminished rights, but he is not entirely divested of constitutional protections once he has been convicted of a crime. Prisoners maintain protection under the due process clause and may not be deprived of life, liberty, or property without due process of law. 94 S. Ct., at 2974. In fact, it has recognized that various states have created constitutionally enforceable liberty interests in the prison setting through such means as statutes, administrative regulations, and published prison policy. See, e.g., *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12, 60 L.Ed.2d 668, 99 S. Ct. 2100 (1979) and *Board of Pardons v. Allen*, 482 U.S. 369, 377-78, 96 L.Ed.2d 303, 107 S. Ct. 2415 (1987).

This Court explained in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 104 L.Ed.2d 506, 109 S. Ct. 1904 (1989), that in determining whether a protectible liberty interest has been created in a prison context, it closely examines the language of the relevant statute or regulation and looks for the presence of the following features, which are critical to its analysis:

> Simply stated, " 'a State creates a protected liberty interest by placing substantive limitations on official discretion.' " *Olim v. Wakinekona*, 461 U.S., at 249, 75 L.Ed.2d, 813, 103 S. Ct. 1741. A State may do this in a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions

> suggest, however, that the most common manner in which a State creates a liberty interest is by establishing
> " 'substantive predicates' " to govern official decision making, *Hewitt v. Helms*, 459 U.S., at 472, 74 L.Ed.2d 675, 103 S. Ct. 864, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met. . . .
>
> We have also articulated a requirement, implicit to our earlier decisions, that the regulations contain " 'explicitly mandatory language,' " i.e., specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest. . . . In sum, the use of " 'explicitly mandatory language,' " in connection with the establishment of " 'specified substantive predicates' " to limit discretion, forces a conclusion that the State has created a liberty interest. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S., at 462 and 463, 104 L.Ed.2d, at 516 and 517.

In the context of awarding good time credits toward parole eligibility, subsection (a)(4) of the old version of K.A.R. 44-6-124 explicitly states that "Inmates with no class I, II, III, or IV offenses during the review period *shall receive* at least 80% of the good time credits allocated for that period." Subsections (a)(5) and (b) plainly state that the unit team has discretion for the remaining 20% *only*, if the foregoing condition has been met. Applying this Court's method of analysis quoted above, it can readily be seen that the regulation features "explicitly mandatory language," i.e., "shall receive," in connection with a "specified substantive predicate," i.e., subsection (a)(4), which plainly sets out the requirement that must be satisfied in order to receive the credits. These straightforward features combine to limit official discretion and, upon a finding that the specific criterion has been met, direct that an outcome be effected—the award of at least 80% of the credits. Moreover, when all of the other administrative regulations set out above are placed under liberty interest scrutiny, it becomes quite clear that the majority, if not all, of them test in the affirmative as well.

E. The Circumstances In *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed.2d 17 (1981), Were Mild Compared To What The Petitioners Have Imposed In The Instant Case.

Because the facts of this landmark case are so well known, the respondent will dispense with its background information and proceed directly to a comparison of the two cases. In *Weaver*, the original nondiscretionary good time provisions were never entirely revoked as they were in the immediate case; the amounts of gain time automatically awarded were simply reduced. And even though the reductions had no effect on the total number of gain time credits available to an inmate when all means of acquiring them were considered—in fact, the overall amount was increased—this Court held that the new statute substantially altered the consequences attached to a crime committed before its enactment, and therefore changed " 'the quantum of punishment.' " 450 U.S., at 33. (If the quantum of punishment was increased in *Weaver*, when much of the nondiscretionary system was retained in the new law and alternate ways were provided for acquiring even more gain time than had been available before, a fortiori the quantum of punishment has been increased in the instant case, due to the fact that none of the old nondiscretionary awards for avoiding disciplinary infractions were retained in the new version of K.A.R. 44-6-124.) This Court also noted that "[t]he inquiry [to determine whether a prisoner has been disadvantaged] looks only to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." *Ibid.*

Under the mandatory provisions of the old Florida law, Weaver had the opportunity to reduce his 15 year sentence by approximately 73 months; after the new law became effective, his calculated sentence reduction was lowered to approximately 48 months, thus amounting to a 25 month increase in his estimated length of incarceration. *Id.*, at 28, n.6. With respect to the instant case, the provisions mandating the award of good time credits for good behavior in the old version of 44-6-124 were obviated entirely, and were replaced by a system that accorded absolute discretionary control to prison officials over all the credits. Moreover, a review of the new form of the regulation shows that all the credits can be arbitrarily withheld for virtually any reason imaginable [see, e.g., (f)(6)].

Since subsection (a)(4) of the old regulation mandated the award of at least 96 of the 120 available credits to those inmates with no class I, II, III, or IV offenses for each review period that such a record was maintained, the respondent has de facto earned at least 288 credits against his 10-20 year sentence for each year he has remained free of offenses. However, due to the fact that the petitioners have been permanently withholding all of the credits he has earned since April of 1994 with the new provisions, and will continue to do so unless they are permanently stopped, he will lose 84 months' worth of good time compared to Weaver's 25 (almost a five year difference!) and will be relegated to serve most of his maximum sentence of 20 years. Moreover, no previously awarded release date was reneged on in Weaver; his right to apply for a writ of habeas corpus was unencumbered, i.e., had he chosen to do so; and he was never punished with the loss of several hundred dollars' worth of personal property and years' worth of earned good time for refusing to relinquish that right.

The petitioners have posed the specious argument that unlike the present case, the actual number of available good time credits was reduced in *Weaver*, and that the respondent hasn't been disadvantaged by the amendment to 44-6-124 because he has the same amount of potential good time credit available as he had under the old version of the regulation. In *Weaver*, the actual numbers of credits automatically awarded solely for avoiding disciplinary offenses were reduced; in the instant case, they were extirpated! Notwithstanding the petitioners' attempt to obscure the facts of the Florida case, the overall number of good time credits available to Weaver was actually increased under the provisions of the new legislation. In fact, the respondent argued that due to the enactment of attendant provisions, the net effect was increased availability of gain time deductions. *Id.*, at 34. And with an ironic view towards the present case, one of the ways those credits could be "earned" in *Weaver* was through diligent performance in an educational program. *Id.*, at 35. In response to

the respondent's argument, this Court appositely noted in its opinion that none of the new provisions compensated for the reduction of gain time available solely for good conduct. *Ibid.*

Obviously, the petitioners have posed the same argument the respondent posed in *Weaver.*, i.e., no disadvantage has occurred because the amendment hasn't reduced the overall amount of available good time credits. This argument was soundly foreclosed by this Court when it stated, "The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision than he could for the same conduct under the new provision. To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary provisions." *Ibid.* Concluding the opinion, this Court found that the new law "made more onerous the punishment" for Weaver's crime. (For all the reasons noted above, the respondent asseverates that, with the exception of the difference in the degree of increased punishment, the facts in *Weaver* are substantially the same as those in the instant case, thus warranting the denial of the petitioners' application.)

Serving as further support for the respondent's ex post facto claim, a trilogy of cases from the Tenth Circuit—*Spaulding v. Maynard*, 527 F. Supp. 398, 399, Syl. ¶ 1 (D. Okla. 1981); *Ekstrand v. Oklahoma*, 791 P.2d 92, 95 (Okla. Crim. App. 1990); and *Arnold v. Cody*, 951 F.2d 280, 283 (10th Cir. 1991)—has held that a prisoner who is disadvantaged by an amended time reduction credits statute is entitled to have his credits computed under the statute in effect on the date his crime was committed. Moreover, many of the holdings established in *Weaver v. Graham* were recently reaffirmed by this Court in *Lynce v. Mathis*, supra.

F. **Because Their Interminable Punitive Measures For Refusing To Officially Assume Guilt Suppress The State Statutory And Federal Constitutional Rights of Those Who Wish To Challenge Their Convictions, The Petitioners' Application For Certiorari**

Should Be Summarily Denied (U.S. Const. Art. 1, § 9, Cl. 2; K.S.A. 60-1507; 28 U.S.C. § 2254).

1. The Petitioners' Coercive Tactics Are Designed To Override The Fifth Amendment Privilege Against Compelled Self-Incrimination.

Designed to discourage appeals, finalize convictions, and generate additional evidence, SATP is predicated on an official admission of guilt (see exhibit C). Shortly after the respondent filed his application for a writ of habeas corpus in 1996, he invoked the Fifth Amendment privilege, not because he is concealing incriminating evidence, but because of the petitioners' inexorable demands for a relief-quashing confession. Conceding that an admission of guilt, even if it were false, would invalidate any attempt to obtain post conviction relief and possibly result in the filing of changes for perjury, the petitioners nevertheless continued to withhold exorbitant amounts of the respondent's earned good time and indefinitely postponed his initial parole eligibility. Even if he hadn't collaterally challenged his conviction, the respondent would still be unwilling to concoct a false admission of guilt just to assuage the petitioners. Since the privilege against compelled self-incrimination applies to questioning an individual while his appeal from conviction is pending, *Taylor v. Best*, 746 F.2d 220, 222 (4th Cir. 1984), *cert. denied*, 474 U.S. 982 (1985), the respondent assumes that it would apply to pending habeas proceedings as well.

In *State v. Imlay*, 813 P.2d 979 (Mont. 1991), the defendant's suspended sentence for a conviction of sexual assault was revoked because of his refusal to admit to guilt in a sexual therapy program. His participation in the program was ordered by the sentencing court as a condition of his suspended sentence. The Montana Supreme Court reversed the district court's revocation order because the requisite admission of guilt would foreclose Imlay's Fifth Amendment right not to be a

witness against himself, and would bar any effort on his part to challenge his conviction through newly discovered evidence or collateral attack. *Id.*, at 985.

Acknowledging that the aforementioned avenues of redress are important rights guaranteed to every defendant under the American system of criminal justice, the court reasoned that they would be rendered meaningless under the conditions the state was attempting to impose, i.e., a compelled admission of guilt as a condition of continued freedom. *Ibid.* The court further reasoned that the reliability of an admission of guilt under such circumstances would be highly suspect. *Ibid.* Moreover, the court recognized that since Imlay testified at his trial that he was innocent, a forced admission of guilt would result in the dereliction of his Fifth Amendment right not only as to the crime for which he had been convicted, but also to the crime of perjury. *Ibid.* The court concluded its opinion by stating its belief that the better reasoned decisions are those that protect the defendant's constitutional right against self-incrimination and that prohibit augmenting a sentence for refusing to confess. *Ibid*

Regarding the matter of augmenting punishment because a defendant refuses to admit guilt, most federal courts of appeals that have addressed the issue have followed the Fifth Circuit Court of Appeals' rationale in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966), which was also relied on by the Montana Supreme Court in *State v. Imlay*, supra. The sentencing court in *Thomas* told the accused, who had been convicted of bank robbery, that if he would "come clean," it would be taken into account in the length of sentence to be imposed, but that if he persisted in denying culpability—Thomas' two accomplices had pled guilty to the crime—the Court would take that into account as well. When the defendant remained adamant in proclaiming his innocence, he was sentenced to the maximum term permitted by law. Concluding that the alternatives presented to the accused violated his Fifth Amendment right not to be a witness against himself, the Court of Appeals

vacated the sentence imposed by the trial court. *Id.*, at 946-47. Notwithstanding the fact that the defendant had already been convicted, the Court based its decision on the following ratiocination:

> It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for a new trial (including opportunity to discover new evidence), appeal, petition for certiorari, and *collateral attack*. [Emphasis added.] Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.
>
> The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all of the above-noted post conviction remedies and confess to the crime of perjury. . . . Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of the type which we cannot ignore or approve confronted Thomas. . . . *Id.*, at 945.

With respect to the instant case, the respondent's contention that the punishment for his reputed crime has been augmented is supported by this Court in *Weaver v. Graham*, 450 U.S., at 32, wherein it was held that the method of awarding time reduction credits is, in fact, one determinant of an individual's prison term, and that his effective sentence is altered once this determinant has been changed.

The petitioners in the instant case have even promised the infliction of punishment years from now should the respondent prevail. Shortly after this case had been filed in the Kansas Supreme Court, he was informed that if he continues to resist, his conditional release (held to be "mandatory" in *Beck*, supra) will be made contingent on an admission of guilt and the completion of SATP, and that if he hasn't acquiesced by the time his conditional release date arrives in 2001, they will release him just long enough to sign his parole revocation papers for failure to comply with the aforementioned conditions. The Fifth Amendment protects a prisoner's refusal to admit to a crime where he is threatened with the loss of benefits, including the withholding of parole. . . . *McMorrow*

v. Little, 109 F.3d 432 (1997). And in *Minnesota v. Murphy*, 465 U.S. 420, 444, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984), this statement was made in the dissenting opinion: "First, many—probably most—of the persons threatened with sanctions if they refuse to answer official questions lack sufficient knowledge of this Court's decisions to be aware that the State's threat is idle." However, thus far the petitioners' threats in the case at bar have been anything but idle!

Possessed by all citizens of the United States, no matter who they are or how they are situated, the Fifth Amendment privilege against self-incrimination extends beyond trial or custodial situations, because "the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith*, 451 U.S. 454, 462, 101 S. Ct. 1866, 1873, 68 L.Ed.2d 359 (1981). Therefore, the privilege extends to those already convicted of a crime. *Minnesota v. Murphy*, 465 U.S., at 426, 104 S. Ct., at 1141-42, citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976). "The general rule that the privilege must be claimed when self-incrimination is threatened has also been deemed inapplicable in cases where the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony.' " *Murphy*, 465 U.S. at 434, 104 S. Ct. at 1145-46, citing *Garner v. United States*, 424 U.S. 648, 661, 96 S. Ct. 1178, 47 L.Ed.2d 370 (1976). Access to the privilege is foreclosed when an individual is penalized for invoking it, and has been termed as the "classic penalty situation" by this Court. Under such conditions, the privilege is said to be "self-executing." *Murphy*, 465 U.S. at 435, 104 S. Ct. at 1146.

Since juries are by no means infallible, innocent individuals are sometimes convicted of crime. As noted above, the respondent didn't invoke the privilege because he is concealing incriminating evidence, he invoked it in response to the petitioners' unremitting attempts to force him to lie about this innocence. If he were truly guilty of rape, he never would have left his condom behind as

evidence for the authorities. Severely punished and irreparably harmed for exercising constitutional rights, the respondent prays that this Court will deny the petitioners' application for a writ of certiorari.

2. Denying Parole Eligibility And Conditional Release To Only Certain Individuals Who Have Been Convicted of An Alleged Sex-Related Offense Because They Refuse To Abdicate The Statutory And Constitutional Right To Seek Habeas Relief, While All Other Offenders Are Free To Challenge Their Convictions Unfettered, Violates The Precepts Of Due Process And Equal Protection Of The Law.

The Suspension Clause of the Constitution, Art. 1, § 9, cl 2, states: "The privilege of the Writ of Habeas Corpus shall not be suspended. . . ." In solemn defense of the Great Writ, this Court has stated that "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26, 83 L.Ed. 455, 461, 59 S. Ct. 442 (1939). And in *Johnson v. Avery*, 393 U.S. 483, 486, 21 L.Ed.2d 718, 722, 89 S. Ct. 747 (1969), this Court made it clear that in instances where state regulations applicable to inmates conflict with federal constitutional or statutory rights, the regulations may be invalidated. Moreover, this Court held in *Ex parte Hull*, 312 U.S. 546, 549, 85 L.Ed. 1034, 1036, 61 S. Ct. 640 (1941) that a state's agents cannot abridge or impair a petitioner's right to apply for a writ of habeas corpus.

Notwithstanding the fact that habeas corpus ad subjiciendum was an integral part of this nation's common law heritage and has been a fundamental clause of the Constitution ever since it was signed by our founding fathers in 1787, *Preiser v. Rodriguez*, 411 U.S. 475, 484-85, 93 S. Ct. 1827, 36 L.Ed.2d 439 (1973), the petitioners are, in effect, brazenly attempting to punish the respondent to the point where he abdicates not only the privilege against self-incrimination, but also the privilege

of applying for the Writ. As previously noted, the petitioners were informed well before the respondent filed his application pursuant to K.S.A. 60-1507 that he would be collaterally attacking his conviction; however, they responded with additional reprisals for his invocation of the aforementioned rights.

"[F]or an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' " *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 54 L.Ed.2d 604, 98 S. Ct. 663 (1978), quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33, no. 20, 36 L.Ed.2d 714, 93 S. Ct. 1977 (1973). "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372, 73 L.Ed.2d 74, 80, 102 S. Ct. 2485 (1982). Due process of law is violated when the government vindictively attempts to penalize a person for exercising a protected statutory or constitutional right. *United States v. Conkins*, 987 F.2d 564, 565, Syl. ¶ 6 (9th Cir. 1993). The respondent asseverates that the petitioners' acts are in direct violation of the above-cited case law and are patently designed to preclude him from petitioning the courts for redress.

Through their reprisals the petitioners have established the discriminatory precedent that only certain individuals who have been convicted of an alleged sex-related offense will be punished for pleading "not guilty" at trial, for maintaining their innocence, and for seeking post conviction relief. The respondent submits that if such bias is countenanced by the courts, K.S.A. 60-1507 should be amended to provide a caveat to such individuals, notifying them of the consequences for invoking the statute. An equal protection violation occurs when the government treats someone differently than another who is similarly situated. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105

S. Ct. 3249, 87 L.Ed.2d 313 (1985); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, Syl. ¶ 7 (10th Cir. 1991).

The respondent respectfully contends that punishing certain individuals so severely and in such a protracted manner for refusing to give up the aforementioned fundamental rights with an official admission of guilt while all other offenders, no matter how serious the crime, are free to challenge their convictions and are accorded the full ambit of provisions for reduced imprisonment without any adverse consequences is highly discriminatory and a patent due process and equal protection violation. Moreover, the petitioners are fully aware of the fact that their tactics act as a strong deterrent to invoking the statutory and constitutional process that is supposed to be made equally available to everyone, and can result in overwhelming an innocent individual to the point where he abandons the only means available for attempting to establish his innocence.

III. CONCLUSION

The petitioners have attempted to prepossess this Court's decision by posing the trite conditional that if their application for certiorari is denied, it will result in a flood of violent criminals being released on the streets of Kansas. But the truth of the matter is that many of the inmates in this state are not a threat to the public, are not predisposed to commit violent crimes, and would assume the role of a law abiding citizen if released. Albeit heinous crimes have been committed from time-to-time by rare individuals, but it is highly unfair to greatly enhance an inmate's punishment and attempt to deprive him of statutory and constitutional rights in response to the egregious acts committed by another.

Ideally, the petitioners would have this Court reverse the Kansas Supreme Court's decisions, overrule *Weaver v. Graham*, and accord them plenary power to adversely change the terms of an

inmate's sentence at will—the exact situation our founding fathers strove to prevent when they penned the Ex Post Facto Clauses of the Constitution. If *Weaver* were ever overruled, one of the few remaining impediments would be lifted that prevent prison officials from becoming unjust and tyrannical. For all the reasons stated in this brief, the respondent beseeches this Highest of all Courts to deny the petitioners' application for a writ of certiorari.

Respectfully submitted,

Raymond F. Stansbury

Raymond F. Stansbury

Exhibit A

SEXUAL ABUSE TREATMENT PROGRAM

SATP
DCCCA, Inc.
c/o Lansing Correctional Facility
P.O. Box 2
Lansing, Kansas 66043

Telephone (913) 727-3235 ext. 7257
Fax (913) 727-2675

April 18, 1995

David A. Reed
Attorney at Law
5121 Parallel Parkway
Suite 3
Kansas City, Kansas 66104

RE: Patrick Shaw

Dear Mr. Reed:

This is in response to your letter of February 24, 1995 regarding concerns of SATP participation as a voluntary program. Participation in SATP is voluntary and certain criteria must be met for acceptance. SATP imposes no consequences for refusals.

Sincerely,

Barbara Owens, LSCSW
SATP Coordinator

BO:lh

BEST AVAILA

Exhibit B

IN THE DISTRICT COURT OF LEAVENWORTH COUNTY, KANSAS

Jerry R.C. Cooper, Plaintiff	)	
v.	)	Case No. 9303CV00111
DECCA, Inc., et al., Defendants	)	

DEFENDANT MCKUNE'S ANSWERS TO PLAINTIFF'S 1st SET OF INTERROGATORIES

COMES NOW the defendant, David McKune, and answers the plaintiff's 1st Set of Interrogatories as follows:

1. Lansing Correctional Facility
P.O. Box 2
Lansing, KS 66043

Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504

2a. Approximate current number of participants is 1 for every 9 month period.

b. Participation is voluntary, not required by t Kansas Department of Corrections.

c. Between September 1, 1989 and April 1, 1993, men successfully completed the SOTP through either program provided by Weldy and Weldy or DCCCA.

BLE COPY

Exhibit C

S.A.T.P.

ADMISSION OF GUILT

This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Lansing Correctional Facility, which includes an admission of Guilt for my sex crime.

I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt.

This document will serve as my official Admission of Guilt to the following:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____

Signature Date

_____ _____

Witness Date

No. 98-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT D. HANNIGAN, WARDEN, ET AL., PETITIONERS

v.

RAYMOND F. STANSBURY, RESPONDENT

PROOF OF SERVICE

Pursuant to Supreme Court Rule 29, I, Raymond F. Stansbury, hereby declare that I served a true and correct copy of the enclosed Motion For Leave to Proceed *In Forma Pauperis* and Brief In Opposition to the Petition For Writ of Certiorari on each party to the above-captioned case by depositing them in the United States Mail, first class postage prepaid, on this 9th day of November, addressed to the following individuals:

Mr. Michael K. Lehr
940 North Main
Wichita, KS 67203
Atty. for Michael Bankes
(316) 264-8181

Mr. Stephen R. McAllister
Asst. Attorney General
301 S.W. 10th Ave.
Topeka, KS 66612-1597
Counsel of Record
(785) 296-2215

RECEIVED
NOV 16 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of November, 1998.

Raymond F. Stansbury

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-367

In The

Supreme Court of the United States

October Term, 1998

ROBERT D. HANNIGAN, WARDEN, *et al.*,

Petitioners,

v.

RAYMOND F. STANSBURY,

Respondent.

CHARLES SIMMONS, SECRETARY OF CORRECTIONS, *et al.*,

Petitioners,

v.

MICHAEL A. BANKES,

Respondent.

On Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson Street, Suite 400
Topeka, KS 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General
STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)
301 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

I. Whether Ministerial State Prison Regulations Are "Laws" For *Ex Post Facto* Purposes Is An Unsettled And Important Issue Of Federal Law 1

A. Kansas Prison Regulations Adopt The View That Changes In Parole Eligibility And Conditional Release Regulations Are Not "Laws" For *Ex Post Facto* Purposes 1

B. Respondent, Like The Kansas Supreme Court, Ignores The Remedial Purposes Of The Regulations 3

II. Respondent's Equal Protection, Fifth Amendment Self-Incrimination, And Due Process Claims Are Not Before The Court 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

In re Ramirez, 705 P.2d 897 (Cal. 1985) 3

Kirkpatrick v. Simmons, et al., No. 96-3140-MLB (D. Kan. July 24, 1998) 4

Lile v. McKune, et al., 1998 WL 689824 (D. Kan. Sept. 16, 1998) 4

Montana v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *cert. dismissed*, 506 U.S. 5 (1992) 4

Prater v. United States Parole Commission, 802 F.2d 948 (7th Cir. 1986) (en banc) 3

Sandin v. Conner, 515 U.S. 472 (1995) 3, 5

Turner v. Safley, 482 U.S. 78 (1987) 3

Washington v. Harper, 494 U.S. 210 (1990) 3

OTHER AUTHORITY

K.A.R. § 44-6-107 ..... 1, 2

REASONS FOR GRANTING THE WRIT

I. Whether Ministerial State Prison Regulations Are "Laws" For *Ex Post Facto* Purposes Is An Unsettled And Important Issue Of Federal Law

With respect to the issue of when prison regulations may constitute "Laws" for constitutional *ex post facto* purposes, petitioners incorporate by reference and rely principally upon the discussion of that issue in the reply brief in *McKune, et al. v. Steltzlen*, No. 98-366, a related case. As respondent's opposition brief (hereinafter "Opp.") in this case makes doubly clear, the relevant *statutes* governing parole and conditional release have not changed since he committed his crime. Opp. 1-2. Instead, he complains that the *regulations* have been changed, Opp. 2-9, as petitioners have always acknowledged. That, however, is the initial issue in this case – whether the regulatory changes that affect respondent constitute "Laws" for federal *ex post facto* purposes.

A. Kansas Prison Regulations Adopt The View That Changes In Parole Eligibility And Conditional Release Regulations Are Not "Laws" For *Ex Post Facto* Purposes

Importantly, respondent's reliance on K.A.R. § 44-6-107, *see* Opp. 2-3, confirms petitioners' position that not all prison regulations are "Laws" for *ex post facto* purposes. Instead, as the portions of the regulation respondent quotes at length make clear, the prison regulations themselves clearly state that the "*statutes* constituting the substantive law in effect at the time the crime is committed shall apply to compute the sentence term and

the release dates." Opp. 3 (quoting K.A.R. § 44-6-107(a), which respondent acknowledges has been in effect continuously since 1984) (emphasis added). To the extent that fair notice is a purpose of the *ex post facto* prohibition, respondent had clear notice that he had no right to rely upon nor expect no change in the regulations affecting matters of parole and conditional release, only the *statutes*.

Respondent's repeated assertion that this regulation compels prison officials to use the parole and conditional release regulations in effect at the time an inmate committed his crimes, *see, e.g.*, Opp. 3, 17, 19, is simply incorrect. The regulation could not be more clear that prison officials are only obliged to follow "statutes" in effect at the time of the inmate's crime. All of K.A.R. § 44-6-107(a) speaks in terms of adherence to the relevant "statutes", with not a mention of similar adherence to "regulations" in effect at the time of the crime.

Under this regulation, Kansas prison officials have – since at least 1984 – taken the position that department of corrections *regulations* affecting parole and conditional release dates are interpretive regulations, not legislative regulations. In petitioners' view, if that position is correct, then the regulations are not subject to *ex post facto* constraints. The question for this Court, and on which the lower federal and state courts are divided, is whether that position is correct as a matter of federal constitutional law.

Although respondent works zealously to explain away all cases the petitioners cited in their petition, Opp. 21-28, the often minute factual distinctions he attempts to

draw, as well as his own concessions, further support petitioners' assertion that a real and important split exists. *See, e.g.*, Opp. 24 (offering "respondent's sincere belief that [*In re*] *Ramirez* [705 P.2d 897 (Cal. 1985)] was wrongfully decided – in fact, the case features an outstanding dissenting opinion to that effect").

B. Respondent, Like The Kansas Supreme Court, Ignores The Remedial Purposes Of The Regulations

Respondent, like the Kansas Supreme Court, focuses solely on the "effects" aspect of *ex post facto* analysis and ignores all other considerations. Thus, respondent ignores remedial purposes of the regulatory changes regarding the Sexual Abuse Treatment Program. For the reasons explained in the petition for a writ of certiorari at pages 28-29, an exclusive focus on disadvantageous effects is incorrect. Moreover, as the Ohio amicus brief points out, the Kansas Supreme Court's focus on "effects" alone runs counter to this Court's strongly declared deference to the judgments of prison administrators. *See, e.g., Washington v. Harper*, 494 U.S. 210, 223-24 (1990); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Sandin v. Conner*, 515 U.S. 472, 482 (1995) (discussing need to avoid discouraging the "desirable development" of prison regulations and procedures); *Prater v. United States Parole Commission*, 802 F.2d 948, 954 (7th Cir. 1986) (en banc) (warning that applying the *ex post facto* prohibition to interpretive regulations will "discourage the formulation and publication of administrative policies"). These issues are of great importance to the States, with their ever-increasing prison populations. *See* Brief *Amici Curiae* of Ohio, *et al.* in

Nos. 98-366, 98-367 (36 states supporting request for review of these important *ex post facto* issues).

II. Respondent's Equal Protection, Fifth Amendment Self-Incrimination, And Due Process Claims Are Not Before The Court

Respondent devotes the final twelve pages of his opposition to several constitutional arguments that he either has not properly preserved or presented in this Court. *See* Opp. 28-39. His equal protection claim was not discussed or decided by the Kansas Supreme Court. *See* Pet. App. 1a-26a. Nor did the Kansas Supreme Court address a Fifth Amendment self-incrimination claim in respondent's case, although it did address and reject such a claim in the companion case, *Bankes v. Simmons, et al.* *See* Pet. App. 27a-45a.[1]

---

[1] This Court several years ago granted a writ of *certiorari* to decide the self-incrimination issue in this context in *Montana v. Imlay*, 813 P2d 979 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *cert. dismissed*, 506 U.S. 5 (1992). Apparently because of a mootness problem in that case, however, the Court did not reach the merits of the claim, leaving it open. In Kansas, the Sexual Abuse Treatment Program, with its requirement of an acceptance of responsibility for the crime as a condition of participation has been both upheld against Fifth Amendment challenge, *Kirkpatrick v. Simmons, et al.*, No. 96-3140-MLB (D. Kan. July 24, 1998), and declared unconstitutional. *Lile v. McKune, et al.*, 1998 WL 689824 (D. Kan. Sept. 16, 1998). Petitioners would be willing to brief and argue the Fifth Amendment issue on the merits in this Court upon an order from the Court to do so. But none of the respondents have raised the issue in either a timely petition for a writ of *certiorari* or a conditional cross-petition.

Finally, the Kansas Supreme Court addressed and rejected a procedural due process claim in respondent's appeal, although not the one respondent appears to be raising in this Court. *See* Pet. App. 21a-26a (discussing application of the Internal Management Procedures and Policies ("IMPP") program to respondent following his refusal to participate in the Sexual Abuse Treatment Program; respondent never mentions the IMPP in his opposition brief in this Court). Moreover, any procedural due process claim here is foreclosed on the merits by this Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995), as the Kansas Supreme Court concluded. Pet. App. 25a-26a. Respondent, however, neither cites nor mentions *Sandin* and, instead, relies upon the very line of liberty interest cases the Court disavowed in *Sandin*. *See* Opp. 28-29.

In any event, respondent has not filed a conditional cross-petition, as he would have to do in order to properly present these independent claims to the Court at this time. Sup. Ct. R. 13.1, 13.4.

CONCLUSION

For the foregoing reasons, the reasons stated in the petition and the reasons set forth in the amicus brief filed by Ohio on behalf of 36 states supporting review of these issues, petitioners respectfully request that this Court grant the petition for a writ of *certiorari* in order to

resolve the splits of authority in the lower federal and state courts.

Respectfully submitted,

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson St., Suite 400
Topeka, KS 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General

STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)
301 S.W. 10th Avenue
Topeka, KS 66612-1597
(785) 296-2215

November, 1998